Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

v.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where a district court, acting under F.R.Civ.P. 12 (b)(6) dismissed a part of a case on the ground that it stated no claim and the court of appeals affirmed the "dismissal" on a theory different than that which furnished the basis of the district court's holding,

1. May the appellate court find the factual basis required by its new theory without first giving the plaintiff an opportunity to demonstrate that there is a genuine issue of material fact which for the first time has become material?

2. May the appellate court disregard this Court's holding in *Fountain v. Filson,* 336 U.S. 681 (1949), in which this very same court of appeals had already been "admonished"*/ by this Court for similar disregard of this same procedural right?

II. Whether a federal court of appeals, in reviewing holdings concerning elements of damages before the district court on a motion for summary judgment, may apply the "clear error" standard utilized for review of findings of fact made pursuant to a trial on the merits rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment?

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*/ *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1537-38 (D.C.Cir. en banc 1984)

PARTIES TO THE PROCEEDING

There are no parties to this case other than those appearing in the caption.

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II. The court below, in reviewing holdings on certain elements of damage before the district court on a motion for summary judgment, violated settled principles when it applied the "clear error" standard utilized for review of findings of fact after a trial, rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment 22

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the opinion issued by the United States Court of Appeals for the District of Columbia Circuit on November 3, 1995 (App.1-21) which appears at 59 F. 3d 988, which affirmed in part and reversed in part the Orders and Judgment of the District Court dated January 26,

1994, March 8, 1994 and June 15, 1994 (App 23, 30, 32). A timely petition for rehearing with a suggestion of rehearing en banc was filed. It was denied on December 21, 1995. (App.22).

STATEMENT OF JURISDICTION

In seeking review of the above referenced decision of the United States Court of Appeals for the District of Columbia Circuit and its denial of his Petition for Rehearing, petitioner invokes certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a sum mary judgment in the party's favor upon all or any part thereof.

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(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment,

interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is a competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF CASE

Petitioner, Arnold D. Berkeley (Berkeley), is an attorney (now retired) who practiced law in the District of Columbia for many years. At the relevant times, he had professional liability insurance with Home Insurance Company (Home). Berkeley sued Home in the United States District Court for the District of Columbia to recover on his professional liability insurance policy. Home had denied

coverage and had thus refused to pay Berkeley's costs of defense of a claim against him and to indemnify him for the judgment against him.

Berkeley represented his then client Arizona Electric Power Cooperative, Inc. (AEPCO), in a law suit on a contingent fee basis. (App.3) That suit was settled, and AEPCO received various in-kind benefits.[1] In May 1991, as provided in the parties' Contingent Fee Agreement (CFA) Berkeley filed an arbitration claim so that the benefits could be valued.(App. 3).

On March 9, 1992, AEPCO filed a counterclaim against Berkeley in the arbitration proceeding based on certain alleged ethical improprieties. (App. 4). Berkeley promptly tendered the counterclaim to Home and asked it to defend him. (App. 4) Home refused. (Id.) It contended that AEPCO was seeking a return of fees previously paid and under the definition of damages in the policy Home was excused from representing Berkeley in a dispute over the return of legal fees. (Id.)

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[1] At the time of the settlement, AEPCO forecast its value at $120-240 million over ten years. Under the Contingent Fee Agreement, Berkeley was entitled to his contingent fee up-front as a percentage of the total present value of the benefits to be received by AEPCO. However, Berkeley gave up the right to receive almost $20 million immediately and agreed to receive the contingency payments as AEPCO received the benefits of the settlement. Thus, he ran the risk that AEPCO might never receive any benefit or might receive less benefit than it had forecast. Eleven years later he was awarded less than one-half that amount.

On September 22, 1992, the arbitrators awarded Berkeley $9.22 million in contingent fees. (App.4).[2] In a separate order on the counterclaim, the panel found that Berkeley had committed three improprieties and ordered him to remit to AEPCO from the fees awarded an amount equal to fifteen (15) percent of the award ($1.383 million). (Id.)[3]

In August 1991, Berkeley retained the law firm of Steptoe & Johnson (Steptoe) to represent him in the arbitration proceeding. The fee agreement called for Steptoe to represent him at 60 percent of its normal hourly rates, with a fee cap of $500,000, and for Steptoe to receive a contingent fee from any recovery. (Docket Entry 5, Exh.3)[4] After Home

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[2] AEPCO challenged the panel's award in an action in the U.S. District Court in Arizona. This challenge was rejected by the District Court. (App. 5). The Ninth Circuit affirmed, 59 F.3rd. 588.

[3] The improprieties found were: (1) his employment of AEPCO's former general manager as a consultant; (2) his filing of a fee claim against AEPCO without first consulting AEPCO; and (3) his representation of the City of Willcox in a law suit AEPCO brought against Willcox. (During the entire period that Berkeley represented AEPCO, he had also represented Willcox in those matters. After he was fired by AEPCO, he continued to represent Willcox at its request. The AEPCO suit against Willcox was brought after he was fired by AEPCO.) The panel described his conduct relative to these acts as being "below the level of propriety expected of a [senior] member of the Bar." (App.42).

AEPCO also filed a complaint against Berkeley with the Bar Counsel of the District of Columbia Bar citing the arbitrators' order. Bar Counsel held that two of the "improprieties" were not violations of the Rules of professional Conduct. The only finding of the arbitrators which Bar Counsel confirmed was the conflict of interest finding; he issued a Confidential Informal Admonition to Berkeley which is the most lenient sanction Bar Counsel is authorized to impose. (App. 45-52)

[4] References to the Docket Entries in the district court shall hereafter be designated (D.E._____).

denied coverage, Berkeley and Steptoe agreed that Steptoe would also represent Berkeley in the counterclaim at the 60 percent rate, the fee cap would be raised to $575,000, and the contingent fee formula would apply to the entire amount. (App.4; D.E 50, Exh.4,¶5)[5]

Berkeley sued Home in the U.S. District Court for the District of Columbia seeking reimbursement for the legal fees and costs he incurred in defending against the counterclaim and indemnification of the counterclaim award. (App. 5). Berkeley moved for summary judgment on liability under Fed. R. Civ. P. 56(c) on the ground that Home had wrongfully failed to defend him in the arbitration action and the resulting appeals and had wrongfully failed to indemnify him for the judgment against him. Home cross-moved to dismiss under Rule 12(b)(6) for failure to state a claim, but it did not move for summary judgment. The trial court granted Home's motion with respect to indemnity, ruling that, as a matter of law, "impropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision" of the insurance policy. (App.27).[6] The

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[5] Berkeley incurred approximately $1.05 million of legal fees, expert witness fees, and other costs after the counterclaim was filed. (D.E.50,Exh. 2) Further, because of Home's refusal to defend, Berkeley owed Steptoe a higher contingent fee when he collected the arbitration award from AEPCO than he would have otherwise.

[6] The exclusion (App. 25) provides that the policy does not apply:

> (a) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured. However, notwithstanding the foregoing, the Company will provide a defense for any such claims without any liability on the part of the Company to pay such sums as the Insured shall become legally obligated to pay as damages.

trial court granted summary judgment to Berkeley with respect to defense costs on the ground that the insurance company had breached its duty to defend and awarded Berkeley a small portion of defense costs claimed.

The court of appeals declined to "decide whether the improprieties noted by the arbitration panel and the conflict of interest found by the D.C. Bar Counsel constituted 'dishonest' conduct within the meaning of the exclusionary clause." (App. 12). Instead, it held as a matter of fact that Berkeley's conduct was a "deliberately wrongful" act within the meaning of the exclusion clause (Id.). It made this finding without giving Berkeley an opportunity to demonstrate that there was a genuine issue as to this fact which became material for the first time as a result of the appellate court's decision. The appellate court affirmed the finding that the duty to defend had been breached, but it refused to review de novo the trial court's summary limitations on the damages awarded and affirmed them as not clearly erroneous.

Berkeley petitioned for rehearing pointing out (1) the "deliberately wrongful" finding turned on his subjective intent and (ii) because Home had not sought summary judgment on that theory below, Berkeley had never had an opportunity to present evidence showing a genuine issue of fact on the intent issue. Berkeley expressly relied upon this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949). Berkeley also asked the court to review the district court's summary judgment damage rulings de novo. The petition was denied. (App. 22).

REASONS FOR GRANTING THE WRIT

Ten years ago, in a trio of decisions[7] this Court encouraged the use of summary disposition to reduce the expense of litigation and the utilization of judicial resources where a trial is really not necessary. Unfortunately, this case provides a serious disincentive to the filing of summary judgment motions and thus acts to defeat the laudable goals of F.R.Civ.P. 56 and this Court's 1986 decisions.

In this case, Home, the defendant, moved to dismiss under Rule 12(b)(6) for failure to state a claim. Berkeley, the plaintiff, moved for summary judgment on liability. In response to the summary judgment motion, Home made no attempt to show the existence of genuine issues of material fact but relied on legal arguments. The district court decided this case based solely upon rulings of law, granting summary judgment on one major portion of the case (insurance coverage) and dismissing another major portion of the case (indemnification). Thus, since the issue of intent had not been raised as a factual issue in the district court, Berkeley did not introduce evidence on that issue.

On appeal, the court of appeals expressly did not rule on the correctness of the district court's crucial legal ruling relating to the dismissal. Rather, the appellate court affirmed on a totally different ground that made material for the first time the factual issue of Berkeley's intent. But the appellate court gave Berkeley no opportunity to show the existence of a genuine issue of material fact on this issue.

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[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Ind'l Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In so doing, the appellate court ignored the procedural protections of Rule 56, and the holding of this Court in *Fountain v. Filson*, 336 U.S. 681 (1949), which the same court of appeals previously recognized that this Court admonished it for precisely this type of sua sponte summary judgment ruling. *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1538 (D.C.Cir. en banc 1984). When the disregard of the Rule 56 protections, even after admonishment. is added to the court of appeals' review of the grant of summary judgment on the amount and nature of the allowed defense costs under the "clearly erroneous" standard, that court has sent the message that moving for summary judgment is a dangerous enterprise, to be avoided if at all possible.

The holding of the court below, in addition to ignoring the clear dictate of Rule 56 and *Fountain* and its application of the "clearly erroneous" standard to legal rulings on summary judgment, can only work to defeat the salutary purpose of this Court's 1986 rulings. It is this aspect of the decision below, as well as the court of appeals' deliberate disregard of this Court's *Fountain v. Filson* admonition, that renders this case important and warrants the grant of certiorari.

I. The court below, in reviewing a ruling granting a F.R.Civ. P. 12 (b)(6) motion to dismiss for failure to state a claim, which perforce was a ruling as a matter of law, violated the protections against arbitrary grants of summary judgment when it altered the theory on which dismissal was based, made material for the first time an essential fact, and then decided that factual issue without first providing the plaintiff an opportunity to demonstrate that it is genuinely at issue.

Rule 56 of the Federal Rules of Civil Procedure authorizes district courts to decide cases using summary procedures in cases where there are no material facts in dispute only after first having given the party against whom judgment is requested an opportunity to demonstrate that there is a genuine issue of material fact.[8] An appellate court, likewise can grant judgment for one party on a theory not considered by the trial court but only upon a finding that the party against whom summary judgment is entered has had the opportunity of showing that there is a genuine issue concerning any fact that for the first time has become material. *Fountain v. Filson*, 336 U.S. 681, 682-83 (1949); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.d. 1276, 1280, n.2 (9th Cir. 1994).

In this case, the district court granted a motion to dismiss Berkeley's claim for indemnity for the judgment

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[8] This is true whether the court is considering summary judgment on motion of the opposing party or upon its own motion. F.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the losing party was on notice that she had come forward with all of her evidence.").

against him. (App.28). On appeal of this ruling, the court of appeals exceeded its authority by making independent, first instance findings of fact on issues related to Berkeley's intent in doing certain acts without first having given Berkeley an opportunity to show that there was a genuine issue on these material facts.

This Court has stressed the importance and utility of the summary disposition techniques authorized by Rules 12 and 56 of the Federal Rules of Civil Procedure and encouraged lower courts to use summary disposition techniques in appropriate cases. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). While these techniques have helped to alleviate the burden of unnecessary trials, this Court has emphasized that this salutary result can be obtained only under the proper safeguards provided by Rule 56 and due process. This case is indicative of a tendency that has developed in the lower courts to depart from the accepted and usual course of judicial proceedings in considering such motions,[9] and, therefore, the exercise by this Court of its supervisory powers over the federal judiciary is warranted.

The essential facts of this case are undisputed. First, Berkeley had an insurance policy which was held by both courts below to be applicable to this dispute. Second, Berkeley sued Home to recover under the policy both his

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[9] See, McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203 (1933); *Shagar v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990); *Canita v. Yellow Freight Sys.*, 903 F.2d 1064, 1068 (6th Cir. 1990); *EEOC v. Luckmarr Plastics, Inc.*, 884 F.2d 579 (6th Cir. 1989); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 (3rd. Cir. 1988).

cost of defending himself and the amount he lost because of the judgment against him. Third, Home moved to dismiss solely on the ground that AEPCO's claim against Berkeley was for a return of fees.

Fourth, Berkeley moved for partial summary judgment on liability. Fifth, it was only in its opposition to Berkeley's motion that Home raised the issue of the applicability of the policy's exclusionary clause. At that time it argued only that as a matter of law it precluded summary judgment for Berkeley. Sixth, under applicable District of Columbia law, Home had the burden of proving the applicability of any exclusion to the award against the insured. It did not introduce any such evidence; nor did it argue that there was any genuine issue of material fact that should send this matter to trial.[10]

Seventh, the court of appeals affirmed the lower court on a theory different than that relied on by the lower court; that new theory depended on a finding that Berkeley knew his conduct was violative of the Rules of Professional Conduct, but in so ruling it did not give Berkeley the opportunity to demonstrate that there was a genuine issue of fact that became material only after the court of appeals' shift of theory. And eighth, as soon as this shift of theory appeared in the appellate opinion, Berkeley, relying on this Court's decision in

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[10]In a Supplemental Memorandum in Opposition to Summary Judgment filed after argument on the motions to dismiss and for summary judgment, Home urged that it needed discovery as permitted by F.R.Civ.P. 56(f) to show, inter alia, that Berkeley's conduct had been "deliberately wrongful." (D.E. 27, p. 57, n. 16). The district court held that the request for discovery came too late. The appellate court affirmed that ruling as within the district court's discretion.(App. 7-11).

Fountain v. Filson, 336 U.S. 681 (1949), petitioned the court below to remand so that he would have the opportunity of showing that his conduct, assuming that it was wrongful, was neither knowingly nor deliberately so within the meaning of the policy.

This Court has established a number of principles regarding the application of Rule 56. In *Associated Press v. U.S.,* 326 U.S. 1 (1945), this Court stated, at 6 that:

> Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them.

In *U.S. v. Diebold*, 369 U.S. 654, 655 (1962), this Court held that even when the facts are clearly established, if the findings required to arrive at a judgment represent a choice of inferences to be drawn from the subsidiary facts contained in affidavits and other supporting documents, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

In this case, Home filed a motion to dismiss. In that motion, the sole issue was whether the complaint, as a matter of law, stated no claim upon which relief could be granted, i.e., that Berkeley could present no facts within the claim stated that would entitle him to judgment. Home contended in particular that the relief requested by and granted to AEPCO was a return of fees which was excluded from coverage. In opposition to that motion Berkeley needed to meet only that argument. And in meeting that argument, he had no occasion to urge that there was a genuine issue of material fact as to whether he had deliberately engaged in wrongdoing.

The only other substantive motion before the district court was Berkeley's motion for partial summary judgment as to liability. Manifestly, he had no occasion to argue in support of that motion that there was a genuine issue of material fact or to present affidavits or other documents to support an argument that there was a genuine issue of fact as to whether he had committed a deliberately wrongful act.[11] And the district court had no occasion to and did not arrive at any finding or conclusion concerning that fact.

The district court denied the motion to dismiss with respect to coverage but granted it as to indemnity. It ruled that, as a matter of law, whenever a lawyer commits an "impropriety" the lawyer has committed "a dishonest" act within the meaning of the policy's exclusionary clause. (App. 11, 27).

The court of appeals did not affirm the district court's legal finding that Berkeley's conduct was within the scope of the "dishonest acts" exclusion as a matter of law. Instead, on its own motion and without affording Berkeley an opportunity to demonstrate that a genuine issue of material fact existed, the court of appeals evaluated the scant material in the record, which did not address in any way Berkeley's intent, and concluded based on that evaluation that his conduct was deliberate and therefore subject to the exclusion on that

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[11] However, as noted in footnote 10, supra, p. 12, at the eleventh hour in an effort to blunt the force of Berkeley's motion for summary judgment, Home requested time for discovery in order to demonstrate the existence of a genuine issue of fact on the issue of intent. It is indeed odd that the court of appeals would find evidence sufficient to support a finding of intent in a set of facts when Home did not even think that evidence raised a genuine issue of material fact on that issue sufficient to withstand Berkeley's motion for summary judgment.

ground. (App.11-16). In essence without notice or opportunity to submit evidence, the court of appeals granted a summary judgment against Berkeley in a situation in which one had not been requested and without affording him the opportunity to demonstrate that a genuine issue of material fact existed.

While an appellate court may affirm a summary disposition on a new theory, it must do so "with great circumspection." *Stella v. Tewksbury*, 4 F.d. 53, 55 (1st Cir. 1993); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361 (D.C. Cir. 1982) (a new theory "rarely" should be adopted on appeal). Before adopting a new theory, the appellate court must be certain the factual record is complete and the loser is not deprived of any "opportunity to remedy" that would have been available in the trial court. *Fountain v. Filson,* 336 U.S. 681, 682-83 (1949).[12] In *Fountain*, this Court stated, at 683:

> Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain

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[12] See also, *Iacurci v. Lummus Co.*,387 U.S. 86 (1967); *Stinson v. Atlantic Cost Line R. Co.*,355 U.S. 62 (1957); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949).

> of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

As this Court made clear in *Fountain*, the *Fountain* ruling on the power of appellate courts to grant summary judgment for a party when neither a motion was made nor the trial court had given notice of a possible sua sponte action follows the principle enunciated in *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (1948), and *Cone v. West Virginia Paper Co.,* 330 U.S. 212 (1947). That principal prohibits an appellate court from entering JNOV in favor of a party who had not moved for JNOV in the trial court: "otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered." This Court made clear in *Fountain* that "the same principle interdicts, *a fortiori,* the appellate court order for summary judgment here." 366 U.S. at 681.[13]

Further, "appellate courts must constantly have in mind that their function is not to decide factual issues de

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[13] Similarly, in *Byrd v. Blue Ridge Elec. Corp., 336 U.S. 525 (1958),* where the appellate court reversed a jury verdict on a factual issue on which the plaintiff had not had an opportunity to present evidence at trial, this Court remarked, at 533:

> The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceeding, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute.

In *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1538 (D.C. Cir. 1984), the District of Columbia Circuit, *en banc*, observed that in *Fountain* this Court set a very high standard for a *sua sponte* grant of summary judgment by an appellate court and noted that in *Fountain* this Court had "admonished" the District of Columbia Circuit when it "attempted to raise and resolve an entirely new issue by summary judgment on appeal."

novo." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

In this case, Home moved to dismiss pursuant to Rule 12(b)(6); it did not seek summary judgment. A Rule 12(b)(6) motion contends that the allegations of the complaint facially establish that the plaintiff cannot prevail on any set of facts. *See, Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The trial court, noting that the arbitrators' decision found that Mr. Berkeley's conduct was "below the level of propriety" expected of a senior member of the bar, held, as a matter of law, that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty'" within the meaning of the policy exclusion.(App. 27)[14] In so ruling, the trial court relied solely upon the complaint and the exhibits incorporated therein, and made explicit in its Order (App. 28) that it was granting a "Motion to Dismiss" and not a summary judgment motion.

Berkeley could not have defeated Home's Rule 12(b)(6) motion or prevailed on his own summary judgment motion by showing a genuine factual dispute as to whether his actions were deliberately wrongful.[15] Thus, he did not offer such evidence. If Home had sought summary judgment, or

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[14] The district court also stated that the arbitrators relied "particularly on the conflict of interest." (App. 27). This is error. The arbitrators' ruling does not give primacy to any of the three grounds and explicitly states that those factors "when considered together" support the award against Berkeley. (App. 28).

[15] The court of appeals disregarded Berkeley's proffer to the contrary and assumed such knowledge to reach its conclusion that "[s]o blatant a violation can only be deliberate." (App. 14).

if the trial court had contemplated entering summary judgment against Berkeley sua sponte, Rule 56(c) would have guaranteed Berkeley a minimum of 10 days to show, at the least, that there was a genuine issue of material fact. The court of appeals deprived Berkeley of this opportunity.

After the appellate decision, Berkeley petitioned for rehearing, raising the issue that the court of appeals decision deprived him of his rights under Rule 56(c). In order to demonstrate that this was not a mere academic issue, Berkeley proffered that, upon remand, he could show the following:

* Berkeley understood the "substantial relationship" test of Rule 1.9 to focus on restricting "side-switching." *Brown v. District of Columbia Bd. of Zoning Adj.*, 486 A.2d 37, 42-43 (D.C. 1984). He believed that where a lawyer sought only to continue an existing representation, which is what occurred here, the rule would be read narrowly.[16]

* Berkeley believed that "side-switching" involved advocating inconsistent positions on "identical" or "nearly identical" issues. *Government of India v. Cook Indus, Inc.*, 596 F.2d 737, 739 (2d Cir. 1978). He understood the relevant "issue" to be the meaning of the contractual provision specifying the respective rights of Willcox and AEPCO. He did not believe his general familiarity with AEPCO was controlling.[17]

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[16] The court of appeals states that "Berkeley was hired by [Willcox] after being fired by AEPCO." (App. 12). In fact, Willcox and AEPCO had been his joint clients for 20 years, and he simply continued the representation of Willcox.

[17] For example, the knowledge developed by representing a broker in ten securities cases over a decade was not "substantially related" to a securities action against the same broker. *Duncan v. Merrill, Lynch, P. F. & S.*,

* His factual recollection at the time was that his firm had never advised either AEPCO or Willcox concerning that contract provision and, indeed, had been excluded from the contract negotiations between AEPCO and Willcox. Only later did he discover that a lengthy memorandum written three years earlier devoted a few sentences to that clause.

* Most importantly, he understood the "substantial relationship" test to apply only where "confidential information" received from a prior client would bear on the issues to be addressed for the new client. *Brown*, supra, 486 A.2d at 49 (defining "methodology" for identifying substantial relationship). Since AEPCO never intended for information supplied in the context of the joint representation to be confidential from Willcox, Berkeley believed the substantial relationship test could not be satisfied.[18] *See, Allegaet v. Perot*, 596 F.2d 246, 250-51 (2d Cir. 1977) (where former client knew that information would be shared with client, substantial relationship test is "inapposite"); *Christensen v. United States District Court*, 844 F.2d 694 (9th Cir. 1988) (same).

Berkeley erred. Perhaps his judgment was colored by his conviction that AEPCO was abusing the trust of Willcox or impaired by his ill-health at the time. (He was experiencing serious heart problems and had just had a triple angioplasty.) In any event, Home agreed to insure such errors so long as they were not deliberately wrongful. We

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Inc., 646 F.2d 1020 (5th Cir. 1981).

[18] Bar Counsel stated that Berkeley 's view on the issue of confidentiality was correct. (App. 50)

respectfully submit that the evidence proffered above is sufficient to require a remand to the district court.

Fundamental fairness, due process, and the settled practice of this Court, *see, Howlett v. Birkdale Shipping Co.*, 512 U.S.___, 114 S.Ct. 2057 (1994); *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620 (1944); *Masson v. New Yorker Magazine*, 501 U.S. 496, (1991), *Fountain v. Filson, supra,* entitle Berkeley to an opportunity to show that there is a genuine fact issue to be determined and, upon that showing, to have his credibility and subjective state of mind assessed by a finder of fact on a full record and not to have his good name sullied without even an opportunity to show that there is a genuine issue as to that material fact.[19]

In concluding that Berkeley's conduct was deliberately wrongful, the court of appeals stressed (App. 14) that Bar Counsel's "imposition of a sanction necessarily implied that Berkeley's violation of Rule of Professional Conduct 1.9 was knowing and intentional."[20] However, the language of Rule 1.9 establishes an objective standard, making no reference to scienter. *Cf. In re James*, 452 A.2d 163, 167 (D.C. 1982) (related predecessor provision does not require scienter). Indeed, substantial sanctions may be imposed for violations occurring with an "innocent state of mind." *In re Dorsey*

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[19] As was pointed out in footnotes 10 and 11, supra, even Home had urged the district court that there was a need to develop the facts on whether Berkeley's alleged wrongdoing was "deliberate."

[20] The court of appeals cited *In re James*, 452 A.2d 163, 166 (D.C. 1982), *cert. denied*, 460 U.S. 1038 (1983). Presumably this case was cited for the proposition that the Court of Appeals was bound by Bar Counsel's finding of dishonest conduct unless it is unsupported by record evidence before Bar Counsel. The problem here is that Bar Counsel made no finding of dishonesty or intentional wrongdoing. (App.45-50).

Evans, 578 A.2d 1141, 1150 (D.C. 1980) (six-month suspension). Petitioner has found no authority suggesting that imposition of an informal admonition under Rule 1.9 requires a knowing or intentional violation, and there is none. If anything, the imposition of the mildest possible sanction under a rule that imposes no scienter requirement, coupled with the absence of any finding of intent, implies a low degree of culpability negating any inference of deliberate wrongdoing.[21]

The factual errors of the court of appeals are referenced here not to suggest that this Court should grant certiorari to correct them. Rather, these errors are referenced to illustrate the anger of appellate courts changing the theory of law on which a case is decided, thereby making material a new factual issue, and then not remanding for consideration of whether there is any genuine dispute as to that fact. These errors also point out the danger of not following the requirements of Rule 56(c) and the wisdom of this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949), requiring appellate courts in the circumstances of this case to remand to permit a party the opportunity of demonstrating the existence of a genuine issue on the newly material fact.

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[21] In its eagerness to resolve this case, the court of appeals came to a conclusion on the issue of intent without a trial ever having been held and indeed without giving Berkeley the opportunity to demonstrate that there was a genuine issue as to intent. This is contrary to this Court's consistent position that summary judgment is not appropriate "where motive and intent play leading roles," *White Motor Co. v. U.S.*, 372 U.S. 253, 259 (1963), quoting *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), at least without giving the losing party the opportunity to demonstrate the existence of a genuine factual issue.

It is the failure of the court below to follow the dictates of *Fountain v. Filson* in the context of the enhanced understanding of the importance of summary disposition, and hence the increased numbers of such dispositions,[22] since this Court's 1986 trilogy of cases that makes this case important and worthy of this Court's attention. Summary judgment is an important vehicle of efficient justice and judicial administration. But it must be utilized within the safeguards established by Rule 56(c) as well as by due process. In light of ten years experience since the 1986 trilogy of summary judgment cases, it is now appropriate for this Court to reiterate the safeguards laid down in *Fountain*. We respectfully urge that this case, in which *Fountain* was so flagrantly disregarded by a court that by its own admission was previously admonished by this Court on this very issue,[23] is an appropriate vehicle for such consideration.

II. The court below, in reviewing holdings on certain elements of damage before the district court on a motion for summary judgment, violated settled principles when it applied the "clear error" standard utilized for review of findings of fact after a trial, rather than the "de novo" standard applicable to review of holdings on issues of law and grants of summary judgment.

The accepted standard of review of a trial court's grant of a motion for summary judgment or to dismiss is de novo review. *Salve Regina College v. Russell*, 499 U.S. 225

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[22] See Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FJC Directions (1991) (setting forth the increased number of summary judgment dispositions, but also pointing out that the increased trend started at least in 1975).

[23] See fn 13, p. 16, *supra*.

(1991); *U.S. v. Mississippi Valley Generating Co.*, 346 U.S. 520, 526 (1961); Moore's *Federal Practice, ¶52.03[2], p.52-77 (1992)*. In this case, the district court rejected, without a trial, certain of Berkeley's claims regarding incurred defense costs that Berkeley claimed Home should have reimbursed. Consequently, there was no opportunity to develop a full factual record and the rulings were made as a matter of law. In reviewing these rulings, however, the court of appeals repeatedly deferred to the trial court's summary rejection of Mr. Berkeley's claimed damages, finding "no clear error."

Because this case arises from rulings on motions to dismiss and for summary judgment - on which the parties before the trial court argued solely on the basis of law and no conflicting evidence was presented - the court of appeals was required to "apply[] the same standard as the district court" deciding each issue de novo and, where the court found that "material facts are subject to divergent inferences," to refuse to resolve the conflict and remand for determination of the factual issue in normal course. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. 1994); *U.S. v. Diebold*, 369 U.S. 654 (1962). Thus, unless the court of appeals independently concluded that the trial court's damage ruling was compelled as a matter of law settled authority required a remand for trial.

The significant error of the court below was to review district court conclusions of law on summary judgment not de novo but for "clear error" of fact. Once again, operating without a complete record, the court below made clear factual errors on which it then relied in assessing the trial court's legal rulings on a standard applicable to findings of fact after a complete record had been made. These errors illustrate the danger and cost of an appellate court

abandoning this Court's settled standard of review in order to achieve a quick resolution of a dispute in which a full record has not yet been developed. Thus, this case is an appropriate vehicle for this Court to clarify an area of law that is even more significant in the post-*Celotex* era.

An examination of what the court of appeals did here is illustrative. First, it ruled (App. 21, n.14) that the trial court's denial of the legal fees incurred by Berkeley to establish Home's breach of its duty to defend[24] was not clear error because "Home had reason to believe that Berkeley's conduct fell within the exclusionary clause" of the policy. In fact, Home never claimed that Berkeley's conduct justified its refusal to defend. Nor would such a claim have been even remotely tenable since the policy expressly required Home to defend (as opposed to indemnify) even against claims arising out of "dishonest, fraudulent,[or] deliberately wrongful acts." (footnote 6, supra). Instead, as the Court of Appeals elsewhere stated (App. 4):

> Home refused to provide a defense, *contending that the only relief [sought by the counterclaim] was the return of legal fees*, which was excluded from coverage under the policy. [emphasis added]

Home's actual claim that the counterclaim sought only a return of fees was rejected by both the trial and appellate courts. Rather than deferring to the trial court on the basis of a factual error, the court of appeals should have

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[24] Generally accepted insurance law provides for the payment of an insured's legal fees when the insured sues to recover the costs of defending himself after the insurance company has refused coverage without justification. *See,* Appelman, *Insurance Law and Practice*, (Bernal ed.), §4691.

reversed on the ground of an error of law. Alternatively, if the court of appeals had concluded that the issue needed to be decided as a matter of fact, it should have remanded for the development of a full record on this issue.

Second, the court below (App. 18) also found no "clear error" in the denial of recovery for the incentive fees paid to Steptoe in the arbitration because the "fee agreement was not materially altered after the counterclaim was filed; the contingent fee was tied to Berkeley's affirmative case." Not so. Lead counsel from Steptoe provided an uncontradicted affidavit (D.E. 50, Exh.4, ¶5) that:

> After the Home declined to pay Berkeley's representation regarding the counterclaim, Steptoe & Johnson and Berkeley agreed that the firm would defend him against the counterclaims under the terms of the initial agreement, including the reduced hourly cap and incentive fee provision. *However, the original fee cap was raised from $500,000 to 575,000.* [emphasis added]

To compensate Steptoe for its reduced hourly rate, Steptoe was to receive an incentive fee of 3% of the recovery above $2 million for each $100,000 of hourly fees charged. (D.E. 50, Exh.3, p.3) Thus, the $75,000 increase in the hourly cap (itself a material change) exposed Berkeley to an additional $22,500 of incentive fees for each $1 million of recovery. As the total recovery on which the incentive fee was figured was $9,669,115, the total additional incentive fee resulting from the $75,000 fee cap increase was $172,555. Therefore, the

total minimum increase in Steptoe's fees was $247,555 (i.e. $75,000 + $172,555 = $247,555).[25]

In the face of these undisputed facts, the trial court decided as a matter of law that the incentive fee paid to Steptoe was not materially changed. Rather than agree, or disagree as a matter of law, the appellate court applied a "clear error" standard applicable to factual findings after the development of a full record. This was error and illustrates the danger in applying the standard of review applicable to factual findings where a full record has not been made.

Third, the court of appeals also failed to make a de novo ruling on Berkeley's preferred position - presented and argued to the trial court and decided by the trial court as a matter of law - that Home's duty to "defend any claim" required it to pay all legal and expert fees incurred to defend the counterclaim, even if those fees also contributed to Berkeley's affirmative case. Instead of deciding de novo whether the trial court was right or wrong as a matter of law or that the issue could not be decided on that basis and therefore required a remand for the development of a full record, the court of appeals merely held that the trial court's denial of those fees was not "clear error." (App 18).

The question presented was not whether expenses may be apportioned between parts of a case that an insurer is obligated to defend and parts it need not defend. Instead, the

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[25] Looked at another way, it is undisputed that Steptoe charged the full $575,000 in hourly fees and that the trial court ruled that $153,385.15 of that amount (about 26%) was attributable solely to the counterclaim (App.34). Thus, Berkeley incurred at least $353,220 of additional incentive fees defending the counterclaim. (Twenty-six percent of the total incentive fee of $1,322,922 is $353,220.)

issue was how to apportion expenses that serve a dual role, advancing a covered defense while also advancing other interests of the insured. The district court excused Home from any expenses that Berkeley would have incurred to advance his affirmative case, even if those expenses also directly serve to defend against the counterclaim, thereby fulfilling Home's duty to defend. This is exactly backwards. In the law of insurance:

> the [insured] is entitled to the full benefit of its bargain. So long as an item...is reasonably related to the defense of a covered claim, it may be apportioned wholly to the covered claim.

Continental Casualty v. Board of Education, 489 A. 2d 536, 545 (Md. 1985).[26]

Home contracted to "defend any claim against the insured including the appeal thereof seeking damages to which this insurance applies" (D.E. 1, Exh. A, p.3), as well as "any...claims" arising out of "any dishonest...or deliberately wrong acts." (Id. p.18). As the court below held, the filing of the counterclaim triggered this contractual duty.

Of course, it is not the province of this Court to decide matters of local insurance law. The significant point is that, when presented with legal arguments as to whether the trial court was right or wrong on its construction and application of local law to a matter before it on motions to dismiss and for summary judgment, the appellate court failed

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[26] To the same point, *Raychem Corp. v. Federal Ins. Co.*, 853 F. Supp. 1170, 1182 (N.D.Cal. 1994); *Nordstrom, Inc. v. Chubb & Son, Inc.*, F. Supp. 530, 536-37(W.D.Wash. 1992).

to apply the correct standard of review. Rather than decide the matter de novo as a matter of law, the appellate court applied the clear error standard applicable to findings of fact after the development of a full record which had not occurred here. In doing so, the appellate court abandoned the standard of review clearly set forth by this Court and conducted a factual review when no opportunity for the development of a full factual record had occurred. *Salve Regina College v. Russell*, 499 U.S. 225 (1991); *U.S. v. Mississippi Valley Generating Co.*, 346 U.S. 520 (1961).

In this post-*Celotex* era, in which trial courts are justifiably deciding more cases in a summary fashion, the standard of review of such decisions is extremely important. Reviewing a decision of law made on summary procedures under a standard applicable to findings of fact made after the opportunity to make a full record turns review on its head and renders summary disposition even more dangerous because of the denial of effective review. This case is an appropriate vehicle for this Court to make clear, in this post-*Celotex* world, the standard of review that is appropriate for summary dispositions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

v.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR CERTIORARI

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 1995 Decided November 3, 1995

No. 94–7149

ARNOLD D. BERKELEY,
APPELLANT

v.

HOME INSURANCE COMPANY,
APPELLEE

Consolidated with
94–7167

Appeals from the United States District Court
for the District of Columbia
(No. 93cv00254)

Richard I. Chaifetz argued the cause for appellant/cross appellee Arnold D. Berkeley. With him on the briefs was *Sherman L. Cohn.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Aaron L. Handleman argued the cause for appellee/cross appellant Home Insurance Company. With him on the brief was *Jack A. Gould.*

Before: WALD, SILBERMAN and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: These appeals involve an attorney and the insurance company that issued him a professional liability insurance policy. When the company refused to defend the attorney against a counterclaim filed by his former client in an arbitrated fee proceeding, the attorney hired other counsel and ultimately prevailed in large part, recovering substantial additional fees from his former client, but was also ordered to remit 15% of his recovery to the client. The attorney subsequently sued the insurance company for breach of contract, seeking reimbursement of the costs of defending the counterclaim and other expenses, and for a declaratory judgment that the insurance company was obligated to indemnify him for the 15% ordered remitted to the client. The district court granted the attorney's motion for summary judgment on count one of the complaint, for reimbursement of expenses for defending against the counterclaim, but granted the insurance company's motion to dismiss count two, for reimbursement of the 15% remittal. The district court ordered the insurance company to pay the attorney slightly over four hundred thousand dollars plus prejudgment interest.

The attorney, Arnold D. Berkeley, appeals on the ground that the district court erred in calculating the amount of reimbursement under count one and in dismissing count two on the ground that the insurer was not liable for the 15% remittal under an exclusionary clause in the policy for "dishonest" conduct. The insurance company, Home Insurance Company, appeals the grant of summary judgment to Berkeley on count one in view of its request for additional discovery pursuant to Federal Rule of Civil Procedure 56(f) and its claim that there were material facts in dispute; it also appeals the reimbursement amount to the extent that the

award included Berkeley's in-house counsel costs. We affirm the grant of summary judgment on count one and the dismissal of count two based on the provision in the exclusionary clause for "deliberately wrongful" conduct. We also affirm the reimbursement order except to the extent that the district court denied any recovery for costs associated with the former client's appeals of the arbitration panel's award.

I.

In 1971 Berkeley began to represent Arizona Electric Power Cooperative, Inc. ("AEPCO") in matters relating to natural gas service provided to it by El Paso Natural Gas Company, an interstate pipeline. Berkeley agreed in the late 1970s to represent AEPCO in a tort and breach of contract action for damages against El Paso. AEPCO and Berkeley entered into a contingent fee agreement in January 1979 whereby Berkeley would receive a fixed fee plus a contingent fee equal to specified percentages of any actual recovery from El Paso; the agreement also contained an arbitration clause for resolution of all disputes.[1] The case was settled in December 1980, and El Paso provided substantial non-monetary benefits to AEPCO. In 1982, AEPCO and Berkeley amended the contingency fee agreement to provide that certain benefits received by AEPCO from El Paso were obtained in settlement of the damages claim, and AEPCO paid Berkeley a total of $2.75 million in contingent fees.

Although Berkeley received contingent fee payments from AEPCO from 1982 to 1991 with regard to certain of these non-monetary benefits, he maintained that AEPCO did not begin to benefit from certain other non-monetary benefits until the late 1980's and never paid him contingent fees with respect to those benefits. In May 1991, Berkeley initiated an arbitration proceeding in which he sought eventually more than $67 million in additional fees. AEPCO denied that it owed any fees and fired Berkeley as its lawyer.

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[1] Section XIII provided that the agreement would continue in existence were either party to invoke arbitration to settle any disagreement about their respective rights and obligations.

AEPCO sued Berkeley and his firm for legal malpractice in the United States District Court for the District of Arizona in August 1991 because of Berkeley's continued representation of the City of Willcox, a former co-client with AEPCO. From at least 1989 until the time he ceased practicing law in 1992, Berkeley purchased professional liability insurance from Home. Home agreed to defend the lawsuit, which included an allegation of Berkeley's violation of canons of ethics by reason of conflicts of interest. In October 1991, AEPCO voluntarily dismissed this lawsuit without prejudice. Then, in March 1992, AEPCO filed a counterclaim against Berkeley in the fee arbitration proceeding alleging that Berkeley had violated his fiduciary duty to his client as a result, in part, of a conflict of interest due to his representation in litigation of the City, which had taken positions adverse to AEPCO.

The counterclaim requested that the 1982 amendment to the contingent fee agreement be declared null and void because of Berkeley's alleged fraud in procuring it, and that Berkeley return all contingent and non-contingent fee payments and be required to disgorge all fees paid since 1979 and all hourly legal fees since the agreement had expired in June 1981. In addition, the fifth and sixth prayers for relief sought to bar Berkeley from recovering additional fees from AEPCO under the contingent fee agreement and to reimburse AEPCO for its costs in defending the fee demand by reason of Berkeley's admission that it was excessive and his conflict of interest in representing the City after he was fired by AEPCO. Finally, the counterclaim sought for AEPCO such other measure of recovery as the arbitration panel thought appropriate. Berkeley tendered the counterclaim defense to Home. Home refused to provide a defense, contending that the only relief AEPCO sought was the return of legal fees, which was excluded from coverage under the policy. Berkeley arranged for the law firm of Steptoe and Johnson, which had defended him against AEPCO's legal malpractice lawsuit, to defend him against the counterclaim.

Following a hearing, the arbitration panel awarded Berkeley $9.221 million in contingent fees, but ordered him to remit 15% of the award to AEPCO in view of conduct that the panel

determined was "below the level of propriety expected of a member of the Bar."[2] Home refused Berkeley's requests for reimbursement of the costs of his defense and the remittal amount. AEPCO went to court to have the arbitration panel's award vacated. The United States District Court for the District of Arizona confirmed the award in May 1993, rejecting AEPCO's argument that the court should adopt a public policy exception precluding disloyal attorneys from receiving compensation from the betrayed client, and finding, in any event, that AEPCO had failed to show an established "public policy barring the payment of legal fees earned more than seven years prior to the attorney's ethical transgressions." The Ninth Circuit affirmed on July 12, 1995. *Arizona Elec. Power Co-Op., Inc. v. Berkeley,* 59 F.3d 988 (9th Cir. 1995).

Meanwhile, on February 9, 1993, Berkeley filed the instant lawsuit against Home alleging breach of contract in count one, and seeking a declaratory judgment for indemnification in count two.[3] Home filed a motion on April 15, 1993, to dismiss the complaint and Berkeley filed a motion for partial summary judgment on May 18, 1993. Home filed an opposition to the motion for summary judgment on June 21, 1993. On October 5, 1993, the district court held a hearing on the

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[2] The arbitration panel found three instances of such conduct: (1) employing AEPCO's former general manager to assist in the preparation of the additional fee claim while continuing to represent AEPCO and without notifying AEPCO; (2) filing the arbitration demand for fees in excess of $67 million without first consulting with AEPCO; and (3) continuing to represent the City "in a litigation in which the City was attempting to hold [AEPCO's] gas supply hostage." Only the conflict of interest in representing the City after being fired by AEPCO was determined by the Bar Counsel of the District of Columbia to be a violation of the D.C. Rules of Professional Conduct.

[3] Because AEPCO's appeal of the arbitration award was still pending in the Ninth Circuit when Berkeley filed his complaint in the instant case, Berkeley sought a declaration that Home would be liable to indemnify him if and when he had to pay the counterclaim award to AEPCO.

motions and directed the parties to file supplemental pleadings on three discrete issues. Berkeley filed its supplemental memorandum in support of partial summary judgment on November 4, 1993. On December 6, 1993, Home filed its supplemental opposition to summary judgment and a supplemental statement of material facts in dispute. Two days later it filed a notice to take Berkeley's deposition, and the district court granted Berkeley's motion for a protective order on December 20, 1993. Thereafter, on January 26, 1994, the district court granted Berkeley's motion for partial summary judgment on count one and granted Home's motion to dismiss count two. After denying Berkeley's motion for clarification regarding recovery of costs for AEPCO's appeals of the arbitration panel award, the district court ordered Home to pay Berkeley $404,260.23 plus prejudgment interest. Both parties appeal, and our review is de novo. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994); *Koval v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

II.

Berkeley's appeal raises two main issues. First, he contends that the district court erred in ruling that Home could avoid liability for the 15% remittal to AEPCO because his conduct fell within the policy exclusion for "dishonest" conduct. He maintains that neither the conflict of interest involving the City nor the other conduct found improper by the arbitration panel is "dishonest" or "deliberately wrongful" conduct within the exclusion. Second, Berkeley contends that the district court erred in failing to award him additional reimbursement and attorneys fees in the instant case. Because there would be no occasion to address these contentions if Home's appeal succeeds, we address Home's appeal first.

A. Home's appeal.

1. **Construction of policy.** Home contends that the relief AEPCO requested in the counterclaim against Berkeley was limited to the return of fees, which the policy did not require Home to defend. This argument is quickly disposed

of. The policy required Home to defend Berkeley against "any claim ... seeking damages to which this insurance applies" and "[t]o pay ... all sums ... which the Insured shall become legally obligated to pay as damages ... by reason of any act, error, or omission in professional services rendered." The term "damages" is defined to mean "a monetary judgment or settlement and does not include ... the return of or restitution of legal fees, costs and expenses arising therefrom." In concluding that Berkeley's breach argument was well taken, the district court correctly noted that:

> [t]he counterclaim includes demands not only for remission of the fees already paid but also for relief from any obligation to pay "additional fees." In addition, the counterclaim sought to require [Berkeley] to pay [AEPCO's] "attorneys fees in defending against [Berkeley's] excessive fee demand." Neither of these items may fairly be described as a claim for "the return or restitution of legal fees" as that phrase is used in the insurance contract.

Rejecting Home's further argument, the district court stated that "[a]n award relieving a party from an obligation to pay money does not differ in practical effect from an award of money damages. Thus, the client's request for relief from 'additional fees' sought 'a monetary judgment or settlement.' "

The district court's analysis is dispositive. *See American Home Assur. Co. v. Miller*, 717 F.2d 1310, 1312 (9th Cir. 1983). Moreover, AEPCO's prayer for attorneys fees was not a request for "the return or restitution of legal fees" within the meaning of the contract. *See Weisberger v. Home Ins. Co.*, 601 N.E.2d 660, 663 (Ohio App. 1991) (construing same exclusionary clause).

2. Misrepresentation as a material disputed factual issue. Home next contends that there was a material disputed fact whether Berkeley's insurance policy was voidable by reason of a misrepresentation in his renewal application. *See* D.C. Code Ann. § 35–414; *Jones v. Prudential Ins. Co.*, 388 A.2d 476, 481 (D.C. 1978); *Hill v. Prudential Ins. Co.*, 315

A.2d 146, 147–48 (D.C. 1974). In its supplemental Rule 108(h) statement of disputed material facts, Home asserted that Berkeley "knew of a potential professional liability claim against him when his firm made an affirmative representation that it knew of no such circumstance as could give rise to a potential claim against the firm in [the application and renewals and in] letter[s] to Administrative Associates, Inc." One of the letters in question was signed three days before Berkeley filed his arbitration proceeding. Home also argues that a 1988 letter to Berkeley from AEPCO's former general manager, warning Berkeley to "be prepared for the explosion" should he contest his contingent fee, put Berkeley on notice that AEPCO would fire him if he made a fee claim against it. The district court, in its discretion, could properly reject Home's belated attempt to reopen its original opposition to the motion for summary judgment. *Cf. Liberles v. County of Cook*, 709 F.2d 1122, 1129 (7th Cir. 1983).

Home first raised the misrepresentation issue in its supplemental opposition to Berkeley's summary judgment motion. Its supplemental opposition was filed on December 6, 1993, after the district court, during the October 5, 1993, hearing on the motions to dismiss and for summary judgment, instructed the parties to file supplemental briefs on three discrete issues.[4] This was more than six months after Berkeley filed his motion for summary judgment, and long after the time for filing an opposition and a Rule 108(h) statement of material disputed facts had expired. D.D.C. Rule 108(b). The supplemental opposition was not responsive in this regard to the district court's October 5 instructions. It was filed just before the district court was about to rule on the cross motions for summary judgment.

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[4] The supplemental briefs were to address: (1) whether prayers five and six in AEPCO's counterclaim would impose liability on Berkeley which was not the disgorgement of legal fees; (2) any documentation available from prior proceedings to show the ingredients of the $9 million arbitration award; and (3) whether a conflict of interests is dishonest conduct under the policy.

Nor can Home's untimely raising of a new issue be excused on the basis of a claim of newly discovered evidence, as Home argued to the district court. *Cf. United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 476 (D.C. Cir.) (Fed. R. Civ. P. 60(b)), *cert. denied* 118 S. Ct. 3040 (1993). Home had all of the records on which it relied in raising the misrepresentation claim in its supplemental opposition before it filed its original opposition to summary judgment on June 21, 1993. Berkeley submitted an undisputed affidavit that his counsel had offered as early as March 1993 to make available to Home's counsel all of the arbitration proceedings documents and Home had not responded. Nor, apparently, did Home seek to obtain the documents on its own from the arbitration panel. Thus, not only was the evidence available to Home through Berkeley's offer, but the application and renewals and at least the May 21, 1991, letter in which Home claims Berkeley made a misrepresentation were in Home's possession.

3. **Rule 56(f).** Finally, Home contends that the district court erred in denying its request for time in which to conduct discovery to support its claim that there was a genuine issue of material fact whether Berkeley had made a material misrepresentation in his application, renewals, and letters.[5]

As the Supreme Court has noted, summary judgment should be entered "after adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, the Fifth Circuit holds that Rule 56(f) motions should be granted "almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *Wich-*

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[5] Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

ita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 n.4 (5th Cir. 1992) (citations omitted), *cert. denied*, 113 S. Ct. 2340 (1993). Notwithstanding the usual generous approach toward granting Rule 56(f) motions, the rule is not properly invoked to relieve counsel's lack of diligence. *Id.* at 919. Were that allowed, the rationale underlying the summary judgment procedure would be undermined, as counsel belatedly devised new theories to delay resolution of long-pending dispositive motions. *See Celotex*, 477 U.S. at 327 (citing Fed. R. Civ. P. 1). Home has failed to show reasons for its untimeliness. *Cf. Morrisey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 35 (1st Cir. 1995).

Nothing in the record suggests that Home confronted any difficulty in obtaining the information that it needed to develop its misrepresentation claim that would have prevented it from timely filing its opposition and Rule 108(h) statement. Home did not identify the reason that it was only "now" learning of the alleged misrepresentation. Indeed, it did not notice Berkeley's deposition until after it filed its supplemental opposition in December, 1993.[6] Furthermore, when Home filed its supplemental opposition, it had already received the arbitration proceeding documents. Home failed to advise the district court, by affidavit, of its continuing need for additional discovery at this late date. Under the rule, bare assertions of need will not suffice when the record reveals none. *Cf. First Chicago Int'l v. United Exch. Co., Ltd.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988). Thus, we find no abuse of discretion by the district court in denying Home's Rule 56(f) motion for further discovery. *See Exxon Corp. v. FTC*, 663 F.2d 120, 129 (D.C. Cir. 1980).

Accordingly, because the district court did not abuse its discretion by disallowing Home's untimely reopening of its

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[6] Home stated in its supplemental opposition that it would be noticing depositions of Berkeley and members of his firm and, depending on the information in the depositions, might depose another firm member; the depositions would have been "directed not only at the issue of the application, but also to establish that [Berkeley] acted dishonestly and that his conduct was deliberately wrongful."

opposition to summary judgment or by denying its Rule 56(f) motion, Home failed to proffer evidence on which a reasonable jury could find that Berkeley had misrepresented the state of his knowledge in the application, renewals and letters, and summary judgment was properly granted on count one of the complaint. *See Shields v. Eli Lilly Co.*, 895 F.2d 1463, 1465 (D.C. Cir. 1990) (citations omitted). We turn to the issues raised in Berkeley's appeal.[7]

B. Berkeley's appeal.

1. Remittal of 15% of arbitrated fee award. Home successfully argued in the district court that an exclusion in the policy prevents Berkeley from recovering from Home the portion of the arbitration award ordered remitted to AEPCO. We review this question of law de novo. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985).

The policy contains an exclusion for:

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured.

The district court concluded that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." Berkeley maintains that the district court's finding of "dishonest" conduct was wrong because the arbitration panel did not make that finding, the Bar Counsel of the District of Columbia imposed the lightest possible sanction for the conflict of interest violation, and the cases hold that a conflict of interest is not fraudulent or dishonest conduct.[8]

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[7] We address Home's contention regarding the award of in-house attorneys fees in Part II(B)(2)(e), *infra*.

[8] Berkeley, however, cites only *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.*, 832 F.2d 1358, 1370 (5th Cir.) (holding that constructive fraud claim does not fall within

We need not decide whether the "improprieties" noted by the arbitration panel and the conflict of interest found by D.C. Bar Counsel constituted "dishonest" conduct within the meaning of the exclusionary clause. There is some supporting authority applicable to a member of the District of Columbia Bar. *Cf. Matter of Shorter*, 570 A.2d 760, 767–68 (D.C. 1990); *see also FDIC v. Mmahat*, 907 F.2d 546, 552–53 (5th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). But, in any event, we do not think it can be seriously disputed that Berkeley's conduct falls within the policy exclusion for "deliberately wrongful" conduct.

District of Columbia Bar Disciplinary Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Berkeley was hired by the City after being fired by AEPCO and on behalf of the City argued a position in litigation that was directly contrary to the interests of his former client. The City had a special status under federal regulations, whereby it was entitled to an uninterrupted gas supply from

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exclusion for claims arising from "fraudulent" acts), *opinion clarified in other respects per curiam*, 832 F.2d 1378 (5th Cir. 1987); *State v. Kopke*, 502 P.2d 813, 817 (Kan. 1972) (holding in attorney disciplinary proceeding that conflict of interest violating code of ethics did not amount to fraud, dishonesty or moral turpitude); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984) (holding that exclusion for fraud did not encompass constructive fraud because "[t]he mere breach of an ethical rule should not fall within the exclusion unless accompanied by 'dishonesty' or 'fraud' ") (citing Ronald Mallen & Victor Levit, *Legal Malpractice*, § 718 at 900 (1981)); *Sade v. National Sur. Corp.*, 203 F. Supp. 680, 684 (D.D.C. 1962) ("dishonest" act within provision of surety bond requires "element of moral turpitude or want of integrity") (quoting *Commercial Banking Corp. v. Indemnity Ins. Co.*, 1 F.R.D. 380, 382 (E.D. Pa. 1940)), *aff'd per curiam*, 314 F.2d 286 (D.C. Cir. 1963).

El Paso. AEPCO bought its gas through the City rather than directly from El Paso so that it too could receive the special benefits. After firing Berkeley, AEPCO attempted to separate itself from the City and buy gas directly from El Paso. Berkeley represented the City in opposing this action by AEPCO.

Berkeley's position before the arbitration panel and Bar Counsel was that although his firm had represented AEPCO in contract negotiations with the City, the firm "had not participated in the drafting or negotiation of the contract provision in question," which governed the right of the City to exercise or withhold its consent in the event that AEPCO sought to purchase directly from El Paso. Bar Counsel rejected this interpretation of the disciplinary rule, stating that even if Berkeley's firm had not drafted the provision at issue, "[t]he application of the Rule does not depend upon the prior imparting of advice, but upon the subsequent representation of interests materially adverse to those of the former client in the same or substantially related matter." Bar Counsel also disagreed with Berkeley's view that his argument for the City—that it could object to AEPCO's dealing directly with El Paso—was not substantially related to his prior representation of AEPCO: "[t]hat position bore a direct and substantial relationship to the dealings among the three entities with which a significant portion of [Berkeley's] representation of AEPCO had concerned itself."

Notwithstanding the obligation to construe insurance contracts favorably to the insured and to construe exclusionary clauses narrowly, *see, e.g., Continental Cas. Co. v. Cole*, 809 F.2d 891, 895 (D.C. Cir. 1987); *Potomac Elec. Power Co. v. California Union Ins.*, 777 F. Supp. 968, 974–75 (D.D.C. 1991), neither Berkeley nor this court can ignore the plain language of the disciplinary rule and the context of Berkeley's disregard of the rule. While some conflicts of interest undoubtedly present difficult and close questions, as Berkeley's ethics expert opined, the conflict described by Bar Counsel did not. To suggest that the direct purchase issues for AEPCO and the City were not substantially related would be to mock Rule 1.9. Whether AEPCO could purchase directly

from El Paso without the City's consent was an issue that Berkeley addressed one way for his former client and another way after he was fired and proceeded to represent the City against the former client in litigation. The conflict of interest was clear to all entities that considered it,[9] including the district court here and, most importantly since Berkeley is a member of the District of Columbia Bar, the D.C. Bar Counsel.[10] Bar Counsel did not equivocate in finding a violation of the Rule, and the imposition of a sanction necessarily implied that Berkeley's violation of the Rule was knowing and intentional. *See In re James*, 452 A.2d 163, 166 (D.C. 1982), *cert. denied*, 460 U.S. 1038 (1983). Berkeley's own ethics expert, Professor Stephen Gillers, concluded that if Berkeley had advised AEPCO that it had the right under the 1985 service agreement with the City to become a direct customer of El Paso without any interference from the City, Berkeley's firm "should not oppose the former client in an action over the construction of a clause that the firm had previously construed for the client. This would be so even if the firm had not drafted the clause," and the firm must be disqualified. So blatant a violation can only be considered deliberate.

The conflict of interest violation did not occur in a vacuum. In his pleadings Berkeley described himself as an experienced regulatory attorney, concentrating in public utility regulatory matters before the Federal Energy Regulatory Commission ("FERC") (and its predecessor the Federal Power Commission). He began representing AEPCO in 1971 before the Commission in matters relating to natural gas service

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[9] The district court in Arizona assumed that the conflict existed and did not review the findings of the arbitration panel.

[10] *See* D.C. Bar R. XI § 6(a)(2) and (3) (Bar Counsel has "the power and duty [t]o investigate ... [and] to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges."); *id.* § 1(a) ("Persons subject to disciplinary jurisdiction [include] [a]ll members of the District of Columbia Bar").

provided to it by El Paso. He drafted the contract by which AEPCO purchased El Paso power through the City, and jointly represented both parties thereafter. When AEPCO fired him, he had represented AEPCO and the City for more than a decade. He was, therefore, in a position to understand thoroughly their positions and interests with regard to uninterrupted access to El Paso power. The fact that Berkeley's firm researched the conflict of interest issue cannot be dispositive; otherwise, a self-interested conclusion would deprive the "deliberately wrongful" conduct provision in the exclusionary clause of the policy of any reasonable meaning where there is a disciplinary rule violation. Because his advocacy of the City's interpretation of the service contract occurred after AEPCO denied that he was entitled to additional fees and fired him, and because the interpretation concerned a critical issue for both parties that Berkeley had addressed over the years, neither inadvertence nor simple negligence nor a mere "impropriety" is at issue. Were we to assume, for purposes of argument, that the violation of the disciplinary rule itself was merely negligent, the context shown by the record nevertheless warrants the conclusion that Berkeley's conduct in arguing a position adverse to his former client was deliberately wrongful.[11]

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[11] In opining on the "propriety" of Berkeley's conduct, AEPCO's ethics expert, Professor Geoffrey C. Hazard, Jr., testified before the arbitration fee panel, in response to a hypothetical question by AEPCO's counsel, that:

> I do have an opinion and it is based not only on the Rules of Professional Conduct but the rules of law that govern the lawyer's responsibility. These govern him in his civil relations apart from the prospect of discipline, and they also reflect recognized standards of practice.
>
> The principle is that, having represented a client in a matter, whether alone or jointly, you may not thereafter undertake a representation adverse to the client in the matter in which you had represented him.

Professor Hazard cited in support "a classic case of attacking your own work, well known in the profession" where a professor drafted

Berkeley's other argument, that the exclusionary clause is ambiguous and, construed most favorably to the insured, excludes coverage only for acts that are dishonest, fraudulent, criminal *and* wrongful, fares no better. His interpretation results in a strained reading of the clause and renders words superfluous: an act that is fraudulent or criminal is also wrongful. *See Combined Ins. Co. of Amer. v. McGillen*, 316 A.2d 854, 856 (D.C. 1974); *Boggs v. Motors Ins. Corp.*, 139 A.2d 733, 735 (D.C. 1958); *American Home Assur. Co. v. J.F. Shea Co., Inc.*, 445 F. Supp. 365, 368 (D.D.C. 1978). In addition, Berkeley's contention that Home was estopped from relying on the exclusionary clause fails for the reason stated by the district court, and not confronted by Berkeley in his briefs on appeal. Unlike the insurers in the cases on which Berkeley relies,[12] Home does not contend that Berkeley's failure to perform a condition after Home refused the tendered defense justified its later refusal to indemnify; rather, Home invokes a circumstance that existed before its own breach of the contract. Berkeley's interpretation would extend the scope of bargained-for coverage. *See Union Trust Co. v. Continental Cas. Co.*, 194 F.2d 901, 902 (D.C. Cir. 1952); *Boonton Handbag Co., Inc. v. Home Ins. Co.*, 310 A.2d 510 (N.J. Super. Ct. App. Div. 1973).

Finally, Berkeley's contention that the district court's decision would undermine indemnity coverage in every professional insurance policy because "virtually every act which a lawyer can commit which would sustain a finding of professional liability in some way violates the Rules of Professional Conduct," and thus "lawyers charged with malpractice [could] never look to the indemnity protection of their professional liability insurance" comes close to pure hyperbole. First, the court has long made clear that the duty to defend is broader than the obligation to indemnify. *See, e.g., Cole*, 809 F.2d at

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a will and after the testator died, participated in a legal attack on the will.

[12] *St. Louis Beef Co. v. Maryland Cas. Co.*, 201 U.S. 173 (1906); *American Fire & Cas. Co. v. Kaplan*, 183 A.2d 914, 915–16 (D.C. 1962).

898. An insurer who refuses to defend risks being held responsible for indemnification for the insured's defense costs over which it had no control; indeed, Home complains that Berkeley seeks reimbursement for attorney's fees based on excessively high hourly rates. Consequently, the prudent insurer will be unlikely to deny coverage under an exclusionary clause in the absence of clear evidence of its application, either by reason of blatant misconduct falling within the terms of the clause or a confirming source, such as a court or Bar Counsel. The courts, in turn, will look at the context of the intentional conduct evidenced by the disciplinary rule violation. *See* cases cited *supra* n.8.

Second, there are some things that lawyers do that insurance companies will not insure against. At least in Berkeley's case the combination of the language of Rule 1.9, his professional expertise in a particular regulatory setting over a number of years in which he represented the parties' interests with respect to uninterrupted access, and the language of the exclusionary clause gave him fair warning. While we do not adopt a *per se* rule, holding that every violation of Rule 1.9 will constitute "deliberately wrongful" conduct, and we express no opinion on the remedy imposed by the arbitration panel,[13] Berkeley has not shown, in the absence of a reasonable interpretation of the exclusionary clause in his favor, why he should be allowed to avoid the language of the contract for which he bargained. Although the arbitration panel relied on two additional improprieties as a basis for liability, because it is sufficient under the policy that the counterclaim award "[arose] out of" conduct by Berkeley that was "deliberately wrongful," we need not decide if the other improprieties fall within the exclusionary clause.

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[13] A dissenting member of the arbitration panel thought that "the facts of [Berkeley's] representation of [the City of] Willcox appear to be vastly overblown—assuming disqualification was required, it has already been accomplished by the Arizona court, which imposed no other sanction," and found no basis for finding that Berkeley's conduct had damaged AEPCO in any monetary amount. D.C. Bar Counsel imposed the sanction of an informal admonition under D.C. App. Bar Rule XI §§ 3, 6 and 8.

For these reasons we conclude that Berkeley's conflict of interest falls within the "deliberately wrongful" conduct language of the exclusionary clause in the policy and that Home's motion to dismiss count two of the complaint was properly granted.

2. **Amount of award.** Berkeley also makes several challenges to the amount of the reimbursement award. We conclude that only his claim for reimbursement in connection with AEPCO's appeals of the arbitration panel award requires further consideration by the district court. *See Safer v. Perper*, 569 F.2d 87, 100 (D.C. Cir. 1977).

a. Costs of AEPCO's appeals of the arbitration award. The district court ruled, in denying a motion for clarification, that Home was not required to pay for Berkeley's effort to defend a favorable award against judicial review because under the policy Home was obligated "only for 'any claim *against* [Berkeley] including the appeal thereof.'" Berkeley maintains, persuasively in our view, that AEPCO's appeals to the Arizona district court and the Ninth Circuit are no different and raise no different issues than if AEPCO had filed a separate damage action against Berkeley and lost. *Cf. Miller*, 717 F.2d at 1312. The Ninth Circuit's opinion disposing of AEPCO's appeal makes clear that AEPCO's effort to prevail on the counterclaim was so closely intertwined with the merits, *see Arizona Elec. Power Co-op., Inc. v. Berkeley*, 59 F.3d at 991–92, that Berkeley is entitled to reimbursement for the costs of the appeals.

b. Increased contingent fee. Berkeley less persuasively maintains that Home was obligated to pay the increased contingent fee that Berkeley had to pay to Steptoe and Johnson when Home declined to defend him against the counterclaim. We find no clear error by the district court in concluding that the increase was a cost of prosecuting the fee claim. The agreement was not materially altered after the counterclaim was filed; the contingent fee was tied to Berkeley's affirmative case. On the other hand, the district court agreed that Berkeley could recover for the risk he undertook

by recovering on the basis of Steptoe and Johnson's full, rather than its reduced, billing rate.

c. All costs of affirmative case. Berkeley also contends that Home was required to reimburse him for all of the costs of his affirmative case after AEPCO filed its counterclaim because of the substantial overlap. He maintains that once AEPCO filed its counterclaim almost all of the costs were for the counterclaim except for valuation, which overlapped the counterclaim and his affirmative case. Hence, he continues, because in reality he was the defendant who had to overcome AEPCO's assertion that his request for additional fees was fraudulent, the district court erred in awarding only the separate costs associated with the counterclaim rather than including overlapping hours.

The district court could properly reject the position that Berkeley was entitled to reimbursement of any expenses he would have had in the absence of the counterclaim, noting that the case on which Berkeley relies, *Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417 (N.J. Super. Ct. App. Div. 1991), *aff'd*, 607 A.2d 1255 (N.J. 1992), involved the refusal to segregate distinct defense costs and not defense from prosecution costs. Berkeley's reference to the provision in the policy requiring Home to "defend *any* claim" does not demonstrate error by the district court. Although, as Berkeley correctly notes, the policy is, at least in one sense, without limitation and does not call for the apportionment of costs, the distinction drawn by the district court is consistent with the policy limitation to which Berkeley refers. We find no clear error in its application.

d. Additional expert witnesses. The same reasoning applies to Berkeley's contention that the costs for two additional expert witnesses should have been included in the award because the valuation and counterclaim issues overlapped. The district court allowed reimbursement for the costs of Berkeley's two legal ethics experts, noting that three of the five witnesses for whose costs Berkeley sought reimbursement were experts in the field of energy law and "presumably would have been necessary absent the counter-

claim." Berkeley has shown no clear error. He retained the two valuation experts prior to the filing of the counterclaim. Indeed, Berkeley admits in his brief on appeal that had the counterclaim not been filed, the two valuation witnesses would have testified. His argument that they were needed once AEPCO challenged Berkeley's claim that it had received benefits fails in the absence of any showing of how much of their time was devoted to the counterclaim.

e. In-house counsel costs. Berkeley was unable to provide contemporaneous time sheets for in-house counsel, and the district court awarded 50% of the costs in light of post-hoc recollections two years after the fact and methodologically flawed estimates. On appeal, Berkeley has not shown that the district court clearly erred in not using an apportionment formula. While the district court observed that the rule on contemporaneous time sheets in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982), did not govern the calculation of damages, it correctly observed that "the concerns that case raises weigh against awarding [Berkeley] the full amount he seeks for his partners' work." Berkeley posits that the failure to have such time sheets is attributable in part to Home's improper declination of coverage when the counterclaim was filed, and in part to the fact that once AEPCO fired Berkeley, he was his firm's only client. The district court's resolution of the matter—rewarding the work done without providing a windfall—was based on a correct legal standard and we find no clear error. Home's argument, that Berkeley is not entitled to reimbursement for these costs because in-house counsel were obligated under the policy to assist in the defense, ignores the fact that the counterclaim was filed against Berkeley only, not his partners, and hence they did not face being held liable to AEPCO.

f. Out of pocket costs. Berkeley also contends that he was entitled to recover a portion of his out-of-pocket office costs based on the same allocation formula that the district court approved in granting reimbursement of Steptoe and Johnson's out-of-pocket costs for the counterclaim. Home maintains that Berkeley never presented evidence to show

that these costs, including meals, taxis, telephone calls and the fee paid to the American Arbitration Association, were related to his counterclaim rather than his fee claim. The district court included in the award one-half of the requested amount of $77,412.79 for Berkeley's office expenses. The record on which Berkeley relies shows that Berkeley's bookkeeper estimated out of pocket expenses as $24,653.33, of which $18,416.04 was attributable to the counterclaim. Thus, we find no clear error by the district court.

Accordingly, we affirm the grant of summary judgment on count one and the dismissal of count two of the complaint.[14] We also affirm the reimbursement order except to the extent that the district court denied any recovery of costs associated with AEPCO's appeals of the arbitration award; we remand for assessment of those costs.

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[14] We find no abuse of discretion by the district court in denying Berkeley fees for the instant case. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). Home had reason to believe that Berkeley's conduct fell within the exclusionary clause. *Cf. Siegel v. William E. Bookhultz & Sons, Inc.*, 419 F.2d 720, 722–24 (D.C. Cir. 1969).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1995

USDC CV 93-0254

No. 94-7149

Arnold D. Berkeley,

Appellant,

v.

Home Insurance Company,

Appellee

and consolidated cross-appeal No. 94-7167

[United States Court of Appeals for the District of Columbia Circuit, FILED Dec 21, 1995 (Clerk's stamp)]

BEFORE: Wald, Silberman and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 1, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

MEMORANDUM

[FILED, Jan 26, 1994, Clerk, U.S. District Court, District of Columbia (Clerk's stamp)]

Plaintiff, an attorney whose former client entered a claim against him in an arbitration proceeding, claims that defendant, his professional liability insurer, breached their insurance contract by failing to represent him in the arbitration proceeding (Complaint, Count I). Plaintiff also seeks a declaratory judgment that defendant is obligated to indemnify him for the amount the arbitrators ordered him to pay his former client (Complaint, Count II). Defendant claims that the insurance policy did not require it to represent plaintiff under the circumstances presented. Defendant has moved to dismiss, and plaintiff has moved for partial summary judgment on liability. For the reasons set forth in this Memorandum, the accompanying Order grants plaintiff's motion for summary judgment as to Count I and dismisses Count II.

I.

Plaintiff and his client were parties to a contingent fee agreement. After several years of an attorney-client relationship, governed by the agreement, in which plaintiff represented his client before the Federal Energy

Regulatory Commission and other tribunals with respect to the client's natural gas business, the client failed to pay fees plaintiff presented to it and terminated their relationship. The agreement contained an arbitration clause. Shortly before the client terminated the relationship, plaintiff filed a demand for arbitration, claiming that the client had failed to pay fees the agreement required of it.

The client filed a counterclaim before the arbitrators alleging generally that plaintiff had violated his fiduciary duty to his client by, among other things, committing a serious conflict of interest by representing an adversary of the client. The counterclaim sought as relief (1) recovery of several million dollars in fees that it had paid the plaintiff over the years and (2) an order from the arbitrators barring plaintiff "from recovering additional fees" and for reimbursing the client "for its attorneys fees in defending against [plaintiff's] excessive fee demand." Complaint, ex. B, at 21. Plaintiff requested that defendant provide him representation in the arbitration proceeding against the counterclaim. Defendant refused, claiming that the relief the client requested in the counterclaim was limited to return of legal fees, a remedy against which the insurance policy did not require defendant to defend plaintiff.

The policy places a duty on the carrier to defend the insured against "any claim . . . seeking damages to which this insurance applies." Complaint, ex. A, at 12, and "[t]o pay . . . all sums . . . which the insured shall become legally obligated to pay as damages . . . by reason of any act, error, or omission in professional services rendered." *Id.* at 11. The policy defines "damages" as follows:

> Damages, whenever used in this policy, means a monetary judgment or settlement and does not include . . . the return or restitution of legal fees, costs and expenses arising therefrom.

Id. at 12. In addition, the policy contains an exclusion for

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured. However, notwithstanding the forgoing, the Company will provide a defense for any such claims without any liability on the part of the company to pay such sums as the Insured shall become legally obligated to pay as damages.

Id. at 14.

A majority of the arbitrators (the arbitrator selected by plaintiff and the independent arbitrator) awarded plaintiff $9,225,000. However, another majority (the arbitrator selected by the client and the independent arbitrator) directed plaintiff "to remit 15% of the award . . . to respondent in satisfaction of the counterclaim herein." Complaint, ex. D, at 2. The decision to direct the 15% remission was justified because plaintiff had engaged in "conduct below the level of propriety expected of a member of the Bar," including the conflict of interest. *Id.*

Plaintiff again contacted defendant, requesting that defendant reimburse his costs in defending the counterclaim and represent him in the arbitration enforcement action before the United States District Court in Arizona. Defendant again refused on the same ground as previously. The District Court confirmed the order of the arbitrators. *Arizona Electric Power Cooperative, Inc. v. Berkeley*, No. CIV 92-681 (D. Ariz. July 23, 1993).

II.

Plaintiff's claim for the expenses incurred in defense of the counterclaim is well taken. The counterclaim included demands not only for remission of the fees

already paid but also for relief from any obligation to pay "additional fees." Complaint, ex. B, at 21. In addition, the counterclaim sought to require plaintiff to pay his client's "attorneys fees in defending against [plaintiff's] excessive fee demand." *Id.* Neither of these items may fairly be described as a claim for "the return or restitution of legal fees" as that phrase is used in the insurance contract. Because the counterclaim requested relief other than the return of legal fees, defendant breached its insurance agreement with plaintiff when it failed to provide him with a defense before the arbitrators. Accordingly, plaintiff is entitled to recover his expenses incurred in providing his own defense.

Defendant argues that the client's request for relief from "additional fees" did not constitute a prayer for "a monetary judgment or settlement" and therefore does not come within the policy's definition of "damages." An award relieving a party from an obligation to pay money does not differ in practical effect from an award of money damages. Thus, the client's request for relief from "additional fees" sought "a monetary judgment or settlement." Even if the client had not sought relief from "additional fees," the insurance contract would still have required defendant to provide plaintiff with a defense, because the counterclaim's prayer for attorney's fees was not a request for "the return or restitution of legal fees" within the meaning of the contract.[1]

With respect to indemnification, defendant correctly invokes the insurance contract's exclusion of any "final

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[1] Defendant argues for the first time in its supplemental memorandum that no portion of plaintiff's Motion for Partial Summary Judgment should be granted because defendant has uncovered a possibility that plaintiff's agent may have made a misrepresentation in applying for insurance from defendant. Defendant has not made a showing sufficient to carry a motion pursuant to Fed. R. Civ. P. 56(f) that it requires additional discovery to respond to plaintiff's motion.

adjudication based upon or arising out of any dishonest . . . acts or omissions committed by the Insured." The arbitrators determined that plaintiff's conduct, particularly the conflict of interest, was "below the level or propriety expected of a member of the Bar." Impropriety of a lawyer is or should be recognized as "dishonesty" within the meaning of the exclusion provision. Furthermore, the arbitral award is the subject of litigation pending in the United States Court of Appeals for the Ninth Circuit. *Arizona Electric Power Cooperative, Inc. v. Berkeley*, Case No. 93-16682. Thus, even if plaintiff were entitled to indemnification for the arbitrators' award against it, he could not prevail now, because the award is not final unless and until the Court of Appeals confirms it.

Plaintiff's contention that defendant's failure to represent plaintiff estops defendant from raising the exclusion provision to avoid its obligation to indemnify plaintiff is inapposite. The authorities plaintiff cites establish that an insurance carrier that has breached an insurance agreement cannot hold the insured to certain affirmative obligations under the agreement, e.g., to secure the carrier's approval before settling the claim. *See, e.g., American Fire & Casualty Co. v. Kaplan*, 183 A.2d 914 (D.C. 1962). Those authorities do not speak to the situation here, where defendant invokes against its duty to indemnify a circumstance — plaintiff's impropriety — that existed before the breach.

Accordingly, the plaintiff's prayer for a declaratory judgment that defendant is liable under the insurance contract on account of the 15% adjustment of the arbitral award must be denied.

Date: January 25, 1994

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jan 26, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

For the reasons stated in the accompanying Memorandum, it is this 25th day of January, 1994, hereby

ORDERED: that plaintiff's Motion for Partial Summary Judgment should be, and is hereby, GRANTED with respect to Count I of the Complaint; and it is further

ORDERED: that defendant's Motion to Dismiss should be, and is hereby, GRANTED with respect to Count II of the Complaint; and it is further

ORDERED: that plaintiff shall be entitled to recover his costs for his representation before the arbitration panel, described in Count I of the complaint, plus prejudgment interest; and it is further

ORDERED: that plaintiff may, on or before February 9, 1994, file and serve an itemization of his costs of representation from the arbitration proceeding and the prejudgment interest on those costs; and it is further

ORDERED: that defendant may, on or before February 19, 1994, file any response to plaintiff's itemization; and it is further

ORDERED: that each party shall bear its own attorney's fees for this action.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Mar 8, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

An Order dated January 26, 1994 granted partial summary judgment for plaintiff and stated "that plaintiff shall be entitled to recover his costs for representation before the arbitration panel, described in Count I of the complaint, plus prejudgment interest." Plaintiff now moves for a clarification of that Order, which would state that plaintiff is additionally entitled to reimbursement of expenses that he incurred in responding to his former client's judicial appeals of the arbitration panel's ruling in plaintiff's favor.

The language of the Order is clear. Plaintiff is entitled to reimbursement only for "his costs for representation before the arbitration panel" and not for his former client's subsequent appeals of the arbitration panel's award to plaintiff. Those appeals of rulings in plaintiff's favor were not covered by plaintiff's insurance agreement with defendant, which promised coverage only for "any claim *against* [plaintiff] including the appeal thereof." Complaint, ex. A, p. 3 (emphasis added).

Accordingly, it is this 7th day of March, 1994, hereby

ORDERED: that plaintiff's Motion for Clarification should be, and is hereby, DENIED; and it is further

DECLARED: that the Order dated January 26, 1994 does not entitle plaintiff to reimbursement for his costs of representation in the judicial appeals from the arbitration panel's ruling.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

MEMORANDUM

[FILED, Jun 15, 1994, Clerk, U.S. District Court, District of Columbia (Clerk's stamp)]

Plaintiff, an attorney, initiated an arbitration proceeding in Arizona against his former client to recover fees the client allegedly owed him. The client filed a counterclaim, charging plaintiff with unethical conduct. Defendant, plaintiff's professional liability insurer, refused to provide plaintiff a defense against the counterclaim. The arbitration panel awarded plaintiff $9,225,000 but also ordered plaintiff to remit 15% of the award in satisfaction of the counterclaim. The arbitration award has been confirmed by the United States District Court in Arizona and remains under review by the United States Court of Appeals for the Ninth Circuit.

Plaintiff brought this action to recover the costs of his defense of the counterclaim before the arbitration panel and to seek indemnification against the panel's award on the counterclaim. Plaintiff's central contention was that his insurance contract with defendant obligated defendant to provide a defense against the counterclaim. An Order dated January 26, 1994 held "that plaintiff shall be entitled to recover his costs for his representation before the arbitration panel . . . plus prejudgment interest . . . ." Jan. 26, 1994 Order at 7. That Order also

denied plaintiff indemnification for the client's recovery against him. The Order instructed plaintiff to file an itemization of his defense costs and permitted defendant to respond. The parties have filed extensive briefs.

Plaintiff initially contends that he is entitled to recover from defendant all of his costs from the arbitration proceeding, including costs associated with prosecuting his original complaint, after the date the counterclaim was filed. Plaintiff argues that many of the resources he expended in defending against the counterclaim would have been necessary to make his affirmative case absent the counterclaim and that all of his expenses should therefore be attributed to the counterclaim.

Plaintiff's contention is without merit. Defendant's improper failure to provide a defense against the counterclaim does not entitle plaintiff to reimbursement for charges for which defendant would not have been liable had the counterclaim never been filed. Plaintiff cites several cases in which state courts allowed plaintiffs to recover all their defense costs although the defendant insurance companies had improperly failed to cover only parts of the defenses. These cases are inapposite, because they involve courts' refusals to segregate, not defense from prosecution costs, but merely distinct defense costs. *See, e.g., Voorhees v. Preferred Mutual Insurance Co.*, 588 A.2d 417 (N.J. Super. 1991), *aff'd*, 607 A.2d 1255 (N.J. 1992). Plaintiff also contends that an itemization of costs between his original claim and the counterclaim is impossible because the two claims present indistinguishable issues. But plaintiff's briefs belie this contention. He proposes an alternative approach for calculating recovery based on affidavits that segregate various costs of defending against the counterclaim. This approach provides a starting point for calculating plaintiff's proper recovery.

The parties do not dispute that plaintiff is entitled to recover the portion of his payments for fees and expenses to the law firm of Steptoe and Johnson ("Steptoe") that, according to an affidavit filed by Samuel

Sipe, a Steptoe partner, financed its work defending against the counterclaim. *See* Plaintiff's Memorandum Regarding Attorney's Fees and Costs ("Plaintiff's Mem."), Ex. 4. These payments, made at an agreed rate below Steptoe's ordinary billing rate, totalled $153,585.15. *See* Amendment to Plaintiff's Memorandum Regarding Attorney's Fees and Costs at 2. Plaintiff also seeks recovery of a portion of a contingent fee that was part of his agreement with Steptoe.[1] The contingent fee agreement was in place before the counterclaim was filed, and plaintiff has presented no evidence that the parties materially altered the contingent fee agreement after the filing of the counterclaim. The contingent fee was based, by definition, on plaintiff's recovery, which depended not on the counterclaim but on plaintiff's affirmative case. However, plaintiff correctly points out that the presence of the contingent fee arrangement decreased his aggregate payments to Steptoe in anticipation of the contingent fee. Defendant suggests that the appropriate way to compensate plaintiff for the risk he undertook by entering into the contingent fee arrangement is to reimburse plaintiff at Steptoe's full billing rate, rather than the reduced rate that Steptoe charged plaintiff in part because of the contingent fee arrangement, for the payments plaintiff actually made. This course of action appears sound. Plaintiff will be reimbursed for his payments to Steptoe in the amount of *$233,679.15.*[2]

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[1] Plaintiff's agreement with Steptoe does not require him to pay the contingent fee until he receives the arbitration award. Thus, the matter of the contingent fee would not be ripe for review if the contingent fee were treated as a separate issue. Determination of the matter here is appropriate because the contingent fee was contemplated by the overall agreement between plaintiff and Steptoe.

[2] This figure is based on defendant's calculation, without defendant's deduction of the insurance policy deductible, addressed below. *See* Defendant's Response to Plaintiff's Memorandum Regarding Attorney's Fees and Costs at 15 n.8. Plaintiff made no objection to this calculation in its Reply.

In addition, plaintiff seeks reimbursement for time and expenses his law partners, Richard Chaifetz and Howard Nelson, contributed to the defense against the counterclaim. Defendant argues that Chaifetz and Nelson cannot recover fees because of a policy provision requiring the insured to "assist . . . in the conduct of suits . . . without charge to" defendant. Complaint, Ex. A, p. 16. Plaintiff responds that only he, and not Chaifetz or Nelson, was named in the counterclaim. Reflecting this policy provision, plaintiff seeks no reimbursement for his own time spent on the defense against the counterclaim. Defendant has presented no authority for the proposition that the policy precluded Chaifetz and Nelson from recovering reasonable legal fees and expensed for their services in the defense of claims against plaintiff.

Plaintiff's request for $278,447.79 [3] to cover the work of Chaifetz and Nelson and related office expenses relies exclusively on the post-hoc recollections and estimates of the attorneys and the firm's bookkeeper. *See* Plaintiff's Mem., Ex's 2, 5, 6 (affidavits of bookkeeper Bernice Martin, Nelson, and Chaifetz). In the distinct setting of an application for attorney's fees after a judgment, the Court of Appeals for this Circuit has held that "the fee application must contain sufficiently detailed information about the hours logged and the work done . . . . Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees." *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

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[3] This figure incorporates a correction in an arithmetic error in plaintiff's memorandum. Plaintiff incorrectly gave the sum of $99,156.00 and $101,879.00 as $202,035.00, rather than $201,035.00. *See* Plaintiff's Mem. at 18. $201,035.00 plus plaintiff's claimed office expenses of $77,412.79 yields the aggregate claim of $278,447.79.

The lawyers' affidavits divide the litigation into several periods and estimate the time they spent on counterclaim work during each phase. Nelson's account of the period between March 9 and April 10, 1992 is representative:

> From the time the counterclaims were filed until the arbitration hearing concluded in August, 1992, I devoted approximately 95% of my time to the arbitration. During this period of time, I worked a minimum of 50 hours a week, usually more. . . . During the period of March 9 to April 10, when we filed our direct case, I estimate that 50% of my time was spent on issues relating to valuation and 50% was spent on issues that were raised by both our direct case and the counterclaim.

Plaintiff's Mem., Ex. 5, at 3-4. Nelson further states that "I did not keep contemporaneous records of my time because I was not being paid on an hourly basis and [defendant] had denied coverage under the firm's malpractice insurance coverage." *Id.* at 3. Chaifetz' estimates and representations are of a piece with Nelson's.

Chaifetz and Nelson clearly contributed substantial effort to the arbitration proceeding. *See* Plaintiff's Reply, Ex. 12 (letter from Samuel M. Sipe, Jr. to Richard I. Chaifetz dated May 5, 1994). The rule of *Concerned Veterans*, *supra*, does not govern the calculation of damages in this case. However, the concerns that case raises weigh against awarding plaintiff the full amount he seeks for his partners' work. The affidavits' estimates of total hours worked, hours spent on the arbitration proceeding, and percentages of time dedicated to the counterclaim are self-evidently rough. The affiants offer no basis for the estimates other than their recollections almost two years after the fact. In addition, the affiants' rough estimates are methodologically flawed, because they appear to count as counterclaim time all work that

contributed to the defense against the counterclaim, even if that work would have been necessary absent the counterclaim. Neither party has suggested a mathematically precise basis for awarding plaintiff some percentage of his request. Given plaintiff's insufficient support for the amount requested, justice is best served by awarding plaintiff half his requested amount. This approach rewards the work of plaintiff's partners while preventing any windfall to plaintiff from his and their inadequate record keeping. Accordingly, plaintiff will be reimbursed for the work of his partners and related office expenses in the amount of *$139,223.90.*

Finally, plaintiff seeks reimbursement for out-of-pocket expenses paid to five expert witnesses, for which he has presented documentation. *See* Plaintiff's Reply to Defendant's Response to Plaintiff's Memorandum Regarding Attorney's Fees and Costs ("Plaintiff's Reply"), Ex. 11. Of these witnesses, three—James Kiely, M.K. O'Toole, and Thomas Brosnan—are experts in the field of energy law, whose assistance presumably would have been necessary absent the counterclaim. Plaintiff has made no attempt to demonstrate that particular percentages of their fees and expenses were attributable to defending against the counterclaim. The two other witnesses, Professors Steven Gillers and Lester Brickman, are experts in the field of legal ethics, an area that only became relevant to the arbitration proceeding because of the counterclaim. Plaintiff's documentation shows total expenditures for these witnesses of $39,076.92 for Gillers and $5,843.85 for Brickman. Accordingly, plaintiff will be reimbursed for expert witness fees in the amount of *$44,920.77.*

Defendant seeks to reduce plaintiff's recovery by $25,000, the amount of the deductible in plaintiff's insurance contract with defendant. Plaintiff points out that the contract permitted defendant to charge the deductible only once per policy year and only once in

connection with two or more matters "arising out of a single act . . . or a series of related acts . . . ." Complaint, Ex. A, p. 15. Plaintiff states that the same former client involved in the arbitration proceeding brought a civil action against him based on the same contentions that gave rise to the arbitration counterclaim during the same policy year it brought the counterclaim. Plaintiff has presented evidence of legal expenses totaling $11,436.41 in defense of that claim after defendant authorized plaintiff's counsel, none of which defendant reimbursed. Plaintiff's Reply, Ex. 10. Defendant concedes that plaintiff has paid that amount toward the deductible. Plaintiff's recovery will therefore be decreased by the balance of the deductible for which plaintiff is liable, *—$13,563.59.*

Accordingly, the accompanying Order directs defendant to pay plaintiff the amount of *$404,260.23.*

Date: June 15, 1994

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jun 15, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

For the reasons stated in the accompanying Memorandum, it is this 15th day of June, 1994, hereby

ORDERED: that, pursuant to the Order dated January 26, 1994, defendant shall pay to plaintiff the amount of *$404,260.23*, plus prejudgment interest; and it is further

ORDERED: that the parties shall attempt to agree on a proposed Order awarding a calculated amount of prejudgment interest and shall, on or before *July 1, 1994*, file any proposed Order to which they have agreed; and it is further

ORDERED: that, if the parties are unable to agree on a proposed Order on or before *July 1, 1994*, each shall, no later than that date, file and serve on the opposing party a preferred proposed Order, and each may, on or before *July 8, 1994*, file a Memorandum stating any objections to the opponent's preferred proposed Order.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0254-LFO

ARNOLD D. BERKELEY,

Plaintiff,

v.

HOME INSURANCE COMPANY,

Defendant.

ORDER

[FILED, Jul 14, 1994, Clerk, U.S. District Court,
District of Columbia (Clerk's stamp)]

An Order dated June 15, 1994 entered judgment on behalf of plaintiff in the amount of $404,260.23. That Order instructed the parties to agree on a proposed order awarding prejudgment interest. The parties on July 7, 1994 filed a stipulation indicating their agreement "that the appropriate amount of prejudgment interest through June 30, 1994 is $30,419.39." Accordingly, it is this 13th day of July, 1994, hereby

ORDERED: that plaintiff shall have judgment in the amount of $30,419.39 in prejudgment interest.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Exhibit "E"
1 of 3

American Arbitration Association
333 East Osborn Road, Suite 310, Phoenix, AZ 85012-2365
Telephone (602) 234-0950 • Fax: (602) 230-2151

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
Arnold D. Berkeley, P.C.

Claimant,

-AND-

Arizona Electric Power Cooperative, Inc.

Respondent.

CASE NUMBER: 76-194-0108-91

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties and dated January 27, 1979 and April 1, 1981 (and amended and clarified thereafter) and having been duly sworn and having duly heard the proofs and allegations of the Parties, FIND as follows:

The contingent fee agreement in this proceeding, as amended, encompassed benefits occurring over a ten year period ending August 31, 1991 with no interest on unpaid fees with the exception of that pertaining to the Ignition Fuel and Flame Stabilization Gas obtained by Claimant for Respondent as the result of the Damage Case against El Paso Natural Gas Company.

Accordingly, Arbitrators Pfeiffer and Simons AWARD as follows:

Respondent, Arizona Electric Power Cooperative, Inc., shall pay to Claimant, Arnold D. Berkeley, P.C., the sum of Nine Million Two Hundred Twenty One Thousand Dollars and No Cents ($9,221,000.00) for Claimant's claim in this arbitration.

9/18/92 /s/ Morton L. Simons
DATED Morton L. Simons, Esq.

9/21/92 /s/ Paul N. Pfeiffer
DATED Paul N. Pfeiffer, Esq.

The Award of the majority of the Panel on the main claim is not supported by its premises, in my opinion.

9/17/92 /s/ William F. Young, Jr.
DATED William F. Young, Jr., Esq.

[Page] 2 of 3

With respect to the Counterclaim, a majority of the Panel FINDS as follows:

The conduct of Claimant, a senior member of the Bar, first in employing Respondent's former general manager, while continuing to represent Respondent, to assist in the preparation of the instant claim without notifying Respondent; second, in filing an arbitration demand with the American Arbitration Association for fees in excess of $67,000,000 without first consulting Respondent; and finally, by continuing to represent his client, the City of Willcox, Arizona in opposition to Respondent in a litigation in which the City was attempting to hold Respondent's gas supply hostage, when considered together, constitute conduct below the level of propriety expected of a member of the Bar. Accordingly, Claimant is directed to remit 15% of the Award in this Arbitration to Respondent in satisfaction of the Counterclaim herein.

9/17/92 /s/ William F. Young, Jr.
DATED William F. Young, Jr., Esq.

9/21/92 /s/ Paul N. Pfeiffer
DATED Paul N. Pfeiffer, Esq.

Arbitrator Simons dissents as to the disposition of the Counterclaim, in which the majority requires Claimant to remit 15% of the Award to Respondent.

First, I do not believe this panel has jurisdiction to act as a disciplinary board, much less to impose sanctions no disciplinary board would impose.

Second, I find no reasoned basis for a finding of liability on the Counterclaim. There is no rule of law or logic that makes an attorney's preparation of a fee claim improper, and it is unclear how Claimant's retention of Respondent's former General Manager somehow makes an otherwise proper action improper. The majority's condemnation of Claimant's action in filing an arbitration claim for $67,000,000 "without first consulting Respondent" not only fails to provide a basis for liability, but is ironic, to say the least: Clearly the filing of an arbitration demand is not improper; if the full amount of a "large" claim is not proven to the satisfaction of the panel, it can and will be reduced; and neither the Association's rules nor any other cognizable standard requires prior consultation before a demand may be filed. Finally, the facts of Claimant's representation of Willcox appear to be vastly overblown—assuming disqualification was required, it has already been accomplished by the Arizona court, which imposed no other sanction.

Third, I find no basis in the record for a finding that Claimant's conduct damaged Respondent in the amount of $1,383,150, or any other sum.

9/18/92 /s/ Morton L. Simons
DATED Morton L. Simons, Esq.

The awarded monetary sums are due and payable within 30 days from the date of this Award and shall thereafter accrue post-Award interest at the rate of 8% per annum until paid.

The administrative fees and expenses of the American Arbitration Association totaling $62,992.10 shall be borne equally by the parties.

The compensation of the neutral arbitrator totaling $18,796.00 shall be borne equally by the parties.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

Exhibit "F"

OFFICE OF BAR COUNSEL
THE BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS
515 Fifth Street, N.W.
Building A, Room 127
Washington, D.C. 20001-2797
(202) 638-1501
FAX (202) 638-0862

BAR COUNSEL
Leonard H. Becker

DEPUTY BAR COUNSEL
Wallace E. Shipp, Jr.

March 26, 1993

CONFIDENTIAL

Arnold D. Berkeley, Esquire
9748 Avenel Farm Dr.
Potomac, Maryland 20854

Re: Berkeley/Slover; Webster
Docket No. 478-92

Dear Mr. Berkeley:

This office has completed its investigation of the above-referenced matter. Because your conduct reflected a disregard of certain ethical standards, we are issuing to you this Informal Admonition pursuant to Rule XI, Sections 3, 6, and 8 of the District of Columbia Court of Appeals Rules Governing the Bar.

By letter dated October 16, 1992, from William L. Slover, Esquire and David N. Webster, Esquire, this office was advised of an award of the American Arbitration Association in a matter involving you and another member of the Bar, and styled *Arnold D. Berkeley, P.C. v. Arizona Electric Power Cooperative, Inc.*, Case No. 76-194-0108-91. Two of the three arbitrators, with the third

arbitrator dissenting, awarded the claimant $9.221 million on a contingent fee agreement. A differently constituted majority of the panel then awarded a remittitur of 15% of the aforesaid award to the respondent on its counterclaim, reciting:

> "The conduct of Claimant, a senior member of the Bar, first in employing Respondent's former general manager, while continuing to represent Respondent, to assist in the preparation of the instant claim without notifying Respondent; second, in filing an arbitration demand with the American Arbitration Association for fees in excess of $67,000,000 without first consulting Respondent; and finally, by continuing to represent his client, the City of Willcox, Arizona in opposition to Respondent in a litigation in which the City was attempting to hold Respondent's gas supply hostage, when considered together, constitute conduct below the level of propriety expected of a member of the Bar."

This office also was made aware of a civil action commenced by Arizona Electric Power Cooperative ("AEPCO") against the Respondent and other attorneys in the United States District Court for the District of Columbia, styled *AEPCO v. Berkeley*, C.A. No. 91-2149 (the "Civil Action"), in which, broadly speaking, the plaintiff sought interim and permanent injunctive relief to preclude the defendant attorneys from continuing their representation of the City of Willcox adversely to AEPCO's interests. The Court denied the motion for interim relief for want of irreparable injury but provisionally agreed that the plaintiff had made out a strong showing of a breach of the disciplinary rule governing conflicts of interest.

On the strength of the arbitration award, we docketed the matter for investigation and called upon you for a response. We received your response under cover of a letter dated November 25, 1992. As described more

particularly below, we find that your conduct violated Rule 1.9 of the Rules of Professional Conduct.

1. *Retention of client's employee.* The arbitral majority found fault in your retention of the former general manager of AEPCO, while still representing the client, to assist in preparing the claim against AEPCO. AEPCO's expert witness thought that contacting the former employee and retaining him pursuant to a consulting agreement six months after he was terminated by AEPCO breached a duty of loyalty owed AEPCO (Hazard direct, at 19 (A0472)). Your expert witness in the arbitration proceeding could not identify an ethical proscription violated by this practice (Gillers Q. 37). We concur in the view expressed by Professor Gillers. Unless you breached a disciplinary rule by preparing and asserting a claim for contingent fees against AEPCO (which, we conclude below, you did not), the retention of a former AEPCO employee to assist in that exercise does not violate any provision of the D.C. Code or Rules.

2. *Assertion of claim without notice.* The arbitral majority next found error in your submission of a claim for a fee in arbitration without first notifying the former client. AEPCO's expert witness argued that the failure to disclose the impending claim to AEPCO or its auditors was dishonest conduct (Hazard direct, at 20 (A0473). Your expert witness noted that the auditor's inquiry called for a response concerning matters "with respect to which you have been engaged," and opined that because you obviously had not been engaged by AEPCO to press a contingent fee claim against AEPCO, you had no duty to disclose the matter to the auditor (Gillers Q. 38). Again, we concur in the view expressed by Professor Gillers. The Code and Rules contemplate that an attorney may prepare a bill for a current client. That exercise necessarily entails considerations that the client might view as not congruent with its interests. If the bill is disputed, the lawyer is not required to withdraw or to

advise the client to obtain separate representation before the lawyer seeks to settle the matter.

3. *Representation of City of Willcox.* The arbitral majority lastly criticized your representation of the City of Willcox in a contract dispute with AEPCO. It appears that for a period of time you represented both AEPCO and the City of Willcox in connection with their power arrangements. The complainants assert in particular that you committed disciplinary misconduct when, in a proceeding before the Federal Energy Regulatory Commission to approve a proposed agreement between AEPCO and El Paso Natural Gas Company, the ultimate source of the power in question, you asserted an objection on behalf of the City of Willcox, based upon the City's alleged right to exercise or withhold its consent to a direct pass-through of the power.

On your behalf, it is contended that, although your law firm had represented AEPCO in connection with the contract negotiation, the firm "had not participated in the drafting or negotiation of the contract provision in question" — a provision that governed the rights of the City as intermediate recipient of noninterruptible power to exercise or withhold its consent in the event that AEPCO sought to undertake a direct relationship with El Paso.

(a) Rule 1.7 of the D.C. Rules of Professional Conduct governs conflict situations between or among present clients. Inasmuch as AEPCO's expert witness conceded in the arbitration proceeding that he was not aware of any conflict that arose prior to the termination of your representation in June 1991 (Hazard direct at 23 (A0476)), we cannot say that we have clear and convincing evidence to the contrary.

(b) Rule 1.9 of the D.C. Rules provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another

person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

(i) You contend that your firm did not draft the "intermediate consent" provision at issue. Thus, the firm was not in the position of rendering conflicting advice to its clients concerning the interpretation of Willcox's right (or lack thereof) to interpose an objection to the proposed direct relationship between AEPCO and El Paso. This fact alone, even if true, would not excuse what would otherwise be a violation of the Rule. The application of the Rule does not depend upon the prior imparting of advice, but upon the subsequent representation of interests materially adverse to those of the former client in the same or substantially related matter.

(ii) You contend that the mere fact of the dual representation did not preclude you from asserting subsequently Willcox's interpretation of the disputed contract provision, because in your view that issue did not bear a "substantial relation" to the prior representation of AEPCO. We disagree. The position taken on behalf of Willcox was that the City could interpose an objection to AEPCO's direct dealings with El Paso. That position bore a direct and substantial relationship to the dealings among the three entities with which a significant portion of your representation of AEPCO had concerned itself. The fact, which you asserted in your response to questions put to you during the arbitration proceeding, that you advised AEPCO (albeit erroneously, in your view) that it did not need to secure Willcox's approval for direct dealings with El Paso under the terms of a trilateral agreement, rather than under the terms of another agreement, known as the service agreement (which you deny that you or your law firm had a role in drafting), does not render the successor representation of Willcox unrelated to the prior representation of AEPCO.

(iii) You contend that because you had jointly represented AEPCO and Willcox, you were free to use information acquired in the joint representation for the benefit of one of the clients against the other. We agree that as between two jointly represented clients on a given matter, neither client may claim a justifiable expectation of confidentiality vis-a-vis the other. However, Rule 1.9 serves a purpose beyond that of protecting the former client's confidence. The Rule also preserves the client's legitimate expectation that the lawyer's duty of loyalty, embodied in his or her fiduciary obligation to the client, precludes the attorney's taking a position adverse to the client on the very matter on which the attorney previously represented the client, or on a substantially related matter. We find no provision either in Rule 1.9 or in the accompanying commentary that would warrant an exception to the Rule for those cases where the attorney has switched sides at the behest of a former client, previously aligned with the aggrieved client as part of a dual representation but now adverse to it.

(iv) Your expert concedes that if your law firm advised AEPCO that it had a right under the agreement to become El Paso's direct customer without let or hindrance by Willcox, and if the advice so given pertained to the contract negotiated by the law firm, then the firm

> "should not oppose the former client in an action over the construction of a clause that the firm had previously construed for that client. This would be so even if the firm had not drafted the clause" (Gillers Q. 45).

Your expert further acknowledges that in the circumstance described above, the consequence "must be" disqualification of the firm (*id.*). Given our disposition, we find it unnecessary to determine the factual premises of the expert's concession in order to conclude that your conduct violated the Rule.

4. In addition to the foregoing items, we note an issue arising from your having asserted a claim in arbitration against AEPCO while still representing the client. Your expert opined:

> "Ordinarily, it is disloyal to sue a current client, whether for oneself or another. Simply put, a client can hardly be expected to work with a lawyer who is, or who is representing, its adversary, even on an unrelated matter. Where the lawyer is himself the adversary, the lawyer will ordinarily have to resign before bringing suit" (Gillers Q. 39).

Nonetheless, the expert believed that mitigating circumstances obtained in this case (*id.*). Of the proffered arguments, the one we find controlling is found in the contingent fee agreement between your firm and AEPCO. That agreement provided in Sec. 13.1 that "pending arbitration between the parties hereto, there shall be no cancellation or forfeiture of this Agreement." Because the agreement itself contemplated disputes between attorney and client and made provision for their resolution during an ongoing representation, we cannot say that pursuit of your claim in arbitration, without more, constituted an ethical breach. *See* Rule 1.7(b)(4) & (c).

We have carefully considered the other claimed breaches of duty asserted by AEPCO's expert witness in his testimony at the arbitration proceeding and find his arguments to be without merit.

This letter constitutes an Informal Admonition pursuant to Rule XI, §§ 3, 6 and 8 of the Rules of the District of Columbia Court of Appeals Governing the Bar.

Please refer to the attachment to this letter of Informal Admonition for a statement of its effect and your right to have it vacated and have a formal hearing. Such a hearing could result in a recommendation to dismiss the charges against you or a recommendation for a find-

ing of culpability, in which case the sanction recommended by the committee is not limited to an Informal Admonition.

If you do wish a formal hearing, you must request it in writing, which must be filed with the Board on Professional Responsibility, 515 Fifth Street, N.W., Building A, Room 101, Washington, D.C. 20001 within 14 days of the date of this letter, unless an extension is granted.

The complainant or other recipient of a copy of this Informal Admonition is reminded that under Section 17(a) of Rule XI of the District of Columbia Court of Appeals Governing Members of the Bar, this disciplinary proceeding, including the issuance of the above Informal Admonition, remains confidential unless and until such confidentiality is waived by the respondent attorney. The complainant or other recipient is not prohibited by this Rule to make use of whatever knowledge he or she may have developed or received from sources other than this proceeding and is otherwise at liberty to use concerning the underlying transactions or events that gave rise to this matter.

Our investigation of the other attorney referred to in the arbitration award has proceeded under a separate docket.

Sincerely,
/s/ Leonard H. Becker
Leonard H. Becker
Bar Counsel

Enclosure

cc.: David N. Webster, Esquire
William L. Slover, Esquire

Sent Certified and Regular Mail

LHB:tab

Supreme Court, U.S.
FILED
APR 17 1996
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No. 95-1495

In The

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

vs.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Court should grant a petition for writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit when:

a. The court of appeals affirmed, on a different ground, the district court's ruling on a question of law concerning the construction of an exclusion in an insurance contract?

b. The court of appeals reviewed the district court's award of damages under the "clearly erroneous" standard and not the "*de novo*" standard?

LIST OF PARTIES

Respondent, The Home Insurance Company, is a wholly owned subsidiary of Home Holdings, Inc.

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STATEMENT OF THE CASE

This is an insurance coverage dispute between Petitioner Arnold D. Berkeley ("Berkeley") and Respondent The Home Insurance Company ("Home"). Berkeley, an attorney, sued his former client, the Arizona Electric Power Cooperative, Inc. ("AEPCO"), for more than $67 million in legal fees. AEPCO filed a counterclaim against Berkeley alleging, *inter alia*, that Berkeley breached his fiduciary duty to AEPCO as a result, in part, of a conflict of interest arising out of his representation of another client who had taken positions, in litigation, adverse to AEPCO. (A. 3, 4).[1] Berkeley tendered the counterclaim defense to Home, but Home declined to defend Berkeley on the ground that the relief sought by AEPCO constituted the return of legal fees, which was excluded from coverage under the policy. Berkeley then arranged for the law firm of Steptoe and Johnson, the firm representing Berkeley in his fee claim against AEPCO, to represent him in connection with the counterclaim. (A. 4).

The fee dispute and counterclaim were tried before a panel of arbitrators, pursuant to an agreement between Berkeley and AEPCO. The arbitration panel awarded Berkeley $9.221 million of the legal fees he sought, but also ordered Berkeley to remit 15% of those fees to AEPCO in view of Berkeley's conduct, which the panel determined was "below the level of propriety expected of a member of the Bar." (A. 4, 5).

Following the arbitration panel's ruling, Berkeley again contacted Home and requested that Home indemnify him for the amount of his fee award he was required to remit to AEPCO as well as reimburse him for his attorney's fees and costs in defending against AEPCO's counterclaim. When Home denied

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1. "A." references are to the Appendix to the Petition for Writ of Certiorari.

coverage, Berkeley sued Home in the United States District Court for the District of Columbia. In count one of his complaint, Berkeley sought contract damages based on Home's refusal to provide a defense in connection with AEPCO's counterclaim. In count two of his complaint, Berkeley sought a declaratory judgment that Home must indemnify him in connection with AEPCO's counterclaim award. (A. 5).

Home filed a motion to dismiss Berkeley's Complaint on April 15, 1993. On May 18, 1993, Berkeley opposed Home's motion and filed his own motion seeking partial summary judgment as to Home's duty to defend and indemnify him under the policy. (A. 5). In support of its own motion to dismiss, and in opposition to Berkeley's motion for summary judgment, Home argued that Berkeley was not entitled to indemnification because the policy expressly excluded:

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured.

(A. 11; D.E. 9, 10).[2]

Berkeley responded to Home's argument in his reply to Home's opposition to his motion for partial summary judgment. (D.E. 14). On October 5, 1993, the district court held a hearing on the two motions. At the hearing, Berkeley's counsel argued that it would be "totally inappropriate" to have a trial on the question of whether Berkeley's conduct came within the policy exclusion. (D.E. 22 at p. 32). The district court did not rule on the motions at the hearing, but rather directed the parties to file

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2. "D.E." references are to the Docket Entries in the district court.

supplemental pleadings. (A. 5, 6). Home, in its supplemental brief, again argued that if Berkeley "committed dishonest or deliberately wrongful acts," Home would not be obligated to indemnify Berkeley for any damages he was required to pay to AEPCO. (D.E. 27 at p. 37). Berkeley, in his reply to Home's supplemental brief, argued:

> this case boils down to whether the "improprieties" found by the Arbitrators were "dishonest" or "deliberately wrongful." As we demonstrated earlier, pp. 6-8, supra, this is a pure question of contract law: what are the meanings of those phrases in the policy and whether the "improprieties" found by the Arbitrators amount to either "dishonest" or "deliberately wrongful" acts. *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1558-59 (D.C. Cir. 1991). [¶] Each of these are questions of law to be decided by this Court.

(D.E. 41 at p. 16).

On January 26, 1994, the district court entered its Order granting partial summary judgment in favor of Berkeley on Count I (the duty to defend) and dismissing Count II (the duty to indemnify). (A. 28). With respect to the duty to indemnify, the district court ruled that the exclusion was applicable because "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." (A. 27). On June 15, 1994, after extensive briefing by Berkeley and Home on the issue of Berkeley's damages under Count I (*see* D.E. 50, 52, 53, 56, 60, 63, 65), the district court issued its ruling on the amount of Berkeley's damages. (A. 32).

Berkeley's appeal challenged the district court's ruling that, as a matter of law, the policy exclusion relieved Home from indemnifying him, and also challenged the adequacy of the amount of damages the district court awarded him in connection with Home's refusal to defend him. On November 3, 1995, the court of appeals affirmed the dismissal of Berkeley's claim for indemnification based on the provision in the exclusion for "deliberately wrongful" conduct of the insured. The court of appeals also affirmed the district court's damage award, except to the extent that the district court denied any recovery for costs associated with AEPCO's appeals of the arbitration panel's award. (A. 3). Berkeley's petition for rehearing in the court of appeals was denied on December 21, 1995. (A. 22).

REASONS FOR DENYING THE WRIT

The writ should be denied because the petition fails to present an important question of federal law where the court of appeals' decision is in conflict with other circuits, nor does the petition demonstrate that the court of appeals' decision departed from the accepted and usual course of judicial proceedings.

I.

IT WAS ACCEPTABLE FOR THE COURT OF APPEALS TO AFFIRM THE DISTRICT COURT'S DISMISSAL OF BERKELEY'S INDEMNIFICATION CLAIM ON A DIFFERENT GROUND.

This Court has long recognized that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran,* 302 U.S. 238, 245 (1937). The rationale behind this rule was explained by the Court in *Securities and Exchange Comm'n v. Chenery Corp.,* 318 U.S. 80 (1943):

> The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.

318 U.S. at 88.

In affirming the district court's order dismissing Berkeley's indemnification claim, the court of appeals stated:

> The district court concluded that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." * * * We need not decide whether the "improprieties" noted by the arbitration panel and the conflict of interest found by D.C. Bar Counsel constituted "dishonest" conduct within the meaning of the exclusionary clause. There is some supporting authority applicable to a member of the District of Columbia Bar. [Citations omitted]. But, in any event, we do not think it can be seriously disputed that Berkeley's conduct falls within the policy exclusion for "deliberately wrongful" conduct.

(A. 11, 12).

The construction and effect of insurance contracts is a matter of law to be determined by the trial court. *See American Red Cross v. Travelers Indem. Co.*, 816 F. Supp. 755, 758 (D.D.C.

1993). The district court concluded, as a matter of law, "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." (A. 27). The court of appeals reviewed that question of law *de novo* (*see Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992)), and concluded that Berkeley's conflict of interest constituted "deliberately wrongful" conduct within the meaning of the policy exclusion. (A. 12-18). Contrary to Berkeley's assertion, the court of appeals' ruling did not require it to decide any questions of fact.[3]

Berkeley's reliance on this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949) is misplaced. In that case, the plaintiffs alleged that the defendants' interest in certain realty located in New Jersey was subject to a resulting trust in favor of the plaintiffs in the amount of $6,000. The district court granted summary judgment in favor of the defendants on the basis that New Jersey law did not permit the imposition of a resulting trust under the circumstances alleged in the complaint. The court of appeals agreed that under New Jersey law no resulting trust could arise; however, based on its own review of the record, the court of appeals remanded the matter to the district court with instructions to enter judgment in favor of the plaintiffs for $6,000. 336 U.S. 681-682. This Court reversed the court of appeals' ruling because

> [t]here was no occasion in the trial court for [the defendant] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When

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3. It should be noted Berkeley, himself, admits that "[t]he essential facts of this case are undisputed." Petition at 11.

> the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive [the defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

336 U.S. at 683.

Fountain is inapposite for two reasons. First, the court of appeals in the case at issue *affirmed* the district court's ruling on a different ground; it did not, *sua sponte*, dismiss Berkeley's claim for indemnification. Second, there were no factual disputes to be decided with respect to whether Berkeley's conflict of interest constituted "deliberately wrongful" conduct within the context of the exclusionary provision. In fact, in the district court, Berkeley correctly acknowledged that this was purely a "question of contract law." (D.E. 41 at p. 16). Accordingly, the court of appeals did not depart from the accepted and usual course of judicial proceedings, nor did it misapply any rule of law, in affirming the district court's decision on a different ground.

II.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD IN REVIEWING THE DISTRICT COURT'S AWARD OF DAMAGES

Berkeley asserts that the court of appeals was required to conduct a *de novo* review of the district court's award of damages. Berkeley is just plain wrong. To begin with, the district court did not determine the amount of Berkeley damages at the summary judgment stage of the proceedings. In fact, Berkeley chose to bifurcate the issues of liability and damages.

(*See* D.E. 14 at p. 3). Consequently, in its order granting Berkeley partial summary judgment as to Home's duty to defend, the district court established the following procedure for the "damage phase" of the case: Berkeley was to file and serve "an itemization of his costs of representation from the arbitration proceeding and the prejudgment interest on those costs" and Home could file a response to Berkeley's itemization. (A. 28, 29). After extensive briefing by both parties, the district court issued its June 15, 1994 Order, which awarded Berkeley $404,260.23, plus prejudgment interest. (A. 39).

In his appeal, Berkeley challenged the amount of district court's damage award on several grounds. The court of appeals applied the "clearly erroneous" standard in reviewing each of Berkeley's challenges to the district court's order and reversed the district court on only one aspect of the award. (A. 18-21).

In the District of Columbia Circuit, "a damage award is a finding of fact governed by Fed.R.Civ.P. 52(a), and is not to be disturbed unless it is determined to be 'clearly erroneous'." *Safer v. Perper,* 569 F.2d 87, 100 (D.C. Cir. 1977). The court of appeals' application of the "clearly erroneous" standard of review for damage awards is not in conflict with any of the other circuits on this issue. *See Four Corners Service Station, Inc. v. Mobil Oil Corp.,* 51 F.3d 306, 312 (1st Cir. 1995); *Sands v. Runyon,* 28 F.3d 1323, 1327 (2nd Cir. 1994); *Tyminski v. United States,* 481 F.2d 257, 271 (3rd Cir. 1973); *U.S. Fire Ins. Co. v. Allied Towing Corp.,* 966 F.2d 820, 825 (4th Cir. 1992); *Marine Trans. Line v. M/V Tako Invader,* 37 F.3d 1138, 1140 (5th Cir. 1994); *Adkins v. Asbestos Corp., Ltd.,* 18 F.3d 1349, 1351 (6th Cir. 1994); *Stanley Gudyka Sales v. Lacy Forest Products,* 915 F.2d 273, 277 (7th Cir. 1990); *Hall v. Gus Const. Co., Inc.,* 842 F.2d 1010, 1017 (8th Cir. 1988); *Sutton v. Earles,* 26 F.3d 903, 918 (9th Cir. 1994); *Hull by Hull v. United States,* 971 F.2d 1499, 1512 (10th Cir. 1992), *cert. denied,* 507 U.S. 1030 (1993);

Nakajima v. United States, 965 F.2d 987, 990 (11th Cir. 1992). Nor does Berkeley contend that the court of appeals misapplied the "clearly erroneous" standard in reviewing the district court's damage award. Accordingly, there is no basis for Berkeley's Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. In its Brief in Opposition, Home does not dispute that, if the Petition properly frames the question presented, the Petition should be granted. Rather, Home argues that the Court of Appeals' decision is one of law on an issue not

decided by the trial court, i.e., that Berkeley had committed a "deliberately wrongful act." But Home ignores the crucial point: the decision below includes the material finding of fact that Berkeley acted "deliberately." And as to that material factual issue, Berkeley had no opportunity to demonstrate that there is a genuine dispute.[1] That is the basis of the Petition; it is completely ignored in the Brief in Opposition.

The motions before the District Court were indeed based solely upon issues of law. Home's motion to dismiss both the coverage and indemnity claims was based upon its argument that Berkeley's dispute with AEPCO was solely over a return of fees, and Berkeley's motion for partial summary judgment as to liability was based upon contract interpretation and insurance law issues. Upon neither of these motions did Berkeley have any reason to argue that there was a genuine issue of material fact for the trial court to determine. Clearly, such an argument would have been an improper response to the motion to dismiss. And, it would have been absurd for Berkeley to make that argument in support of his own motion for summary judgment.

The District Court decided the motions before it as a matter of law. It denied the motion to dismiss as to the claim for coverage but granted it as to the indemnity claim. It held as a matter of law that an "[i]mpropriety of a lawyer

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[1]There was no issue of deliberateness before either the arbitrators or the Bar Counsel, and neither made any finding of fact that Berkeley acted "deliberately." The District Court, of course, acting upon two motions of law, also had no occasion to make a finding on this factual issue. Thus, the Court of Appeals, in shifting the basis of decision to a determination of deliberateness, necessarily made the factual finding de novo.

is or should be recognized as 'dishonesty' within the meaning of the exclusion provision" of the insurance policy.(App. 27)

As Home points out, the Court of Appeals did not affirm the holding that an impropriety by a lawyer is, as a matter of law, "dishonesty." (App. 12) Rather, the Court of Appeals found that Berkeley had committed a "deliberately wrongful" act. (Id.) And it did so without giving Berkeley an opportunity to present contrary evidence that, while his act may have been "wrongful," it was not "deliberate." Thus, the Court of Appeals deprived Berkeley of his right under Federal Rule of Civil Procedure 56(c) to demonstrate that there was a genuine issue on this fact first made material by the Court of Appeal's decision.

The distinction that eludes Home can be seen from examining what would have happened had Home made a motion in the trial court for summary judgment based upon an argument that Berkeley's action was "deliberately wrongful." In that case, Berkeley would have then had the opportunity provided in Federal Rule 56 to demonstrate that, while it might be concluded as a matter of law that the act found to have been an impermissible conflict was a "wrongful" act, there was a genuine issue as to the material fact of whether that act was "deliberately" wrongful, as the policy's exclusion clause required.[2] The Court of Appeals' action in this case deprived Berkeley of that opportunity.

---

[2]There can be no question that the issue of "deliberateness" is a factual issue. Home recognized this in the District Court when it filed a Rule 56(f) motion seeking discovery "to establish that [Berkeley's]....conduct was deliberately wrongful." (App. 6). The District Court rejected this motion, and the Court of Appeals affirmed. (Id.)

This action of the Court of Appeals ignored the admonition earlier laid down -- to the same Court of Appeals -- in *Fountain v.* Filson, 336 U.S. 681 (1949), that courts, in disposing of cases summarily, adhere to the protections provided by Federal Rule 56. With the increased number of summary dispositions, encouraged in part by this Court's 1986 trilogy of summary judgment cases, the importance of that protection has grown, and the significance of the action of the Court of Appeals in this case of ignoring the *Fountain* admonition has grown. Home's attempt in its Brief in Opposition to justify the action of the Court of Appeals by ignoring it is an apt underline to the need for this Court to speak on this subject at this time.

II. Again, Home does not meet the issue concerning damages. There was no factual dispute before the District Court concerning damages; Home never disputed any of the facts presented by Berkeley. Rather, all of the District Court's rulings addressed the construction of the insurance policy or the content of insurance law -- each a question of law.

The clearly erroneous standard of Federal Rule of Civil Procedure 52(a) by its very terms applies to decisions concerning facts that are in dispute, not to conclusions of law based upon those facts. Each of the issues before the Court of Appeals on the damages phase of this case was an issue of law, to be determined de novo by the Court of Appeals, not a review of determinations of disputed questions of fact.

In this era of increased use of summary judgment, Home's attempt to turn rulings of law into determinations of

factual disputes underlines the importance of the issue as to the proper standard to be applied in reviewing such rulings.

CONCLUSION

For the foregoing reasons and those given in the Petition, we urge that a writ of certiorari issue in this case.

Respectfully Submitted,

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